SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 887

WILLIAM L. GREENE, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JUNE 4, 1963

[fol. 1] [File endorsement omitted]

IN THE UNITED STATES COURT OF CLAIMS

No. 153-62

WILLIAM L. GREENE, Plaintiff,

v.

THE UNITED STATES, Defendant.

PETITION—Filed May 7, 1962

1. Plaintiff, William L. Greene, is a citizen of the United States who maintains his legal residence at Weems Creek Drive, Route 4, Annapolis, Maryland.

2. This action is brought to obtain monetary restitution pursuant to Paragraph 26, Department of Defense Directive 5220.6, 20 Fed. Reg. 1553, 32 C.F.R., Pt. 67, issued February 2, 1955, and to obtain restitution upon a claim founded upon the Constitution of the United States. The jurisdiction of this Court is invoked under Sections 1491(1) and (3), Title 28, United States Code.

3. Prior to April 23, 1953, the plaintiff was employed as vice-president and general manager of Engineering and Research Corporation (ERCO), a business located at Riverdale, Maryland, and devoted primarily to developing and manufacturing various mechanical and electronic products. ERCO did classified work for various armed services. In 1951, in connection with a classified research project for the [fol. 2] Navy, ERCO entered into a security agreement pursuant to which industrial security requirements were contractually imposed.

4. On August 9, 1949, plaintiff had been given a confidential clearance by the Army. On November 9, 1949, plaintiff had been given a top secret clearance by the Assistant Chief of Staff G-2, Military District of Washington.

On February 3, 1950, plaintiff had been given a top secret clearance by the Air Material Command. All of these clearances were pursuant to industrial security requirements contractually imposed upon ERCO employees.

5. On December 11, 1951, plaintiff was informed by the Army-Navy-Air Force Personnel Security Board (PSB) that "access by you to contract work and information [at ERCO] . . . would be inimical to the best interests of the United States" and that his clearances were being revoked. He was also advised that he could seek a hearing before the Industrial Employment Review Board (IERB), and plaintiff took that course of action.

6. Plaintiff, with counsel, appeared at hearings before the IERB with respect to certain allegations made about his past associations. The Government presented no witnesses at these hearings and plaintiff had no opportunity to confront or question persons who had allegedly made statements adverse to him. On January 29, 1952, on the basis of these hearings and of the confidential reports, the IERB reversed the action of the PSB and informed plaintiff and ERCO that plaintiff was authorized to work on secret contract work.

7. On April 17, 1953, following the abolition of the PSB and the IERB, the Secretary of the Navy wrote ERCO that, on a review of the case, he had concluded that plaintiff's "continued access to Navy classified security information [fol. 3] [was] inconsistent with the best interests of National Security." No hearing preceded this notification. The Secretary further requested ERCO to exclude plaintiff "from any part of your plants, factories or sites at which classified Navy projects are being carried out [and] to bar him access to all Navy classified information." ERCO had no choice but to comply with this request and plaintiff was in fact discharged by ERCO on April 23, 1953.

8. On October 13, 1953, plaintiff was advised that the Navy had requested the Eastern Industrial Personnel Security Board (EIPSB) to make a final determination concerning plaintiff's status. A hearing before the EIPSB took place on April 28, 1954, again without any confronta-

tion by plaintiff of adverse witnesses, if any. Thereafter the EIPSB affirmed the action of the Secretary of the Navy and ruled that granting clearance to plaintiff for access to classified information was "not clearly consistent with the interest of national security."

9. On September 16, 1955, plaintiff requested review by the Industrial Personnel Security Review Board. On March 12, 1956, plaintiff received a letter from the Director of the Office of Industrial Personnel Security affirming the determination of the EIPSB.

10. In 1954, following the EIPSB determination, plaintiff filed a complaint in the United States District Court for the District of Columbia asking for a declaration that the revocation of his clearance was unlawful, for an order restraining Department of Defense officials from acting pursuant to such revocation, and for an order requiring such officials to advise ERCO that the revocation was void. The District Court granted the Government's motion for summary judgment, 150 F. Supp. 958, and the Court of Appeals affirmed, 103 App. D.C. 87, 254 F. 2d 944.

[fol. 4] 11. On June 29, 1959, following review of the case by the Supreme Court, that Court determined that in the absence of explicit authorization from either the President or Congress, the Secretaries of the Armed Forces were not authorized to deprive plaintiff of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination of adverse witnesses. Greene v. McElroy, 360 U.S. 474. The judgment reached by the lower courts was accordingly reversed.

12. On December 14, 1959, pursuant to the decision and judgment of the Supreme Court, the District Court ordered "that the action of the Secretary of Defense and his subordinates in finally revoking plaintiff's security clearance was and the same is hereby declared to be not validly authorized" and "that any or all rulings, orders, or determinations wherein or whereby plaintiff's security clearance was revoked are hereby annulled and expunged from all records of the Government of the United States."

13. On December 28, 1959, plaintiff made a formal demand of the General Counsel of the Department of the Navy "for monetary restitution from the Department of the Navy and/or the Department of Defense pursuant to Section 26 of the Industrial Personnel Security Review Regulation, 20 Fed. Reg. 1553."

14. On January 11, 1960, the General Counsel of the Department of the Navy acknowledged the demand and requested that certain dates and financial data be supplied, stating that if such information were supplied the claim would receive "such consideration as it deserves." A statement of plaintiff's legal position respecting the applicability of Section 26 was also requested.

15. On April 20, 1960, plaintiff supplied the General [fol. 5] Counsel of the Department of the Navy with the requested information and statement of legal position. Plaintiff stated under oath that he had incurred a $49,960.41 loss of earnings from the date of his dismissal (April 23, 1953) up to December 31, 1959.

16. On January 4, 1961, having been advised that his claim had been forwarded to the Director of the Office of Security Policy of the Department of Defense for final determination, plaintiff renewed his claim in a letter addressed to the said Director. The plaintiff, understanding that the Director was disposed to deny the claim, also requested an opportunity to know and rebut the legal representations made in support of any disposition to deny the claim.

17. On February 8, 1961, the said Director responded that plaintiff might submit in writing any additional material as to his legal position by March 3, 1961. The Director also stated that "this Department is prepared, at his [plaintiff's] request, to consider his case under the above mentioned 1960 Review Regulation [Industrial Personnel Access Authorization Review Regulation, DOD Directive 5220.6, dated July 28, 1960] and to take such action as may be necessary to reach a final determination as to whether it is in the national interest to grant him an authorization for access to classified information."

18. On March 2, 1961, plaintiff wrote to the said director restating his legal position as to the applicability of Section 26 and declining to request a reconsideration of his case under the 1960 regulation. Plaintiff therein stated that he could not

> . . . agree to any procedure which might result in a new, adverse determination which could then be used by the Department to bolster the argument that Section 26 does not apply to this case. And such a possible determination—whether made by the Screening Board [fol. 6] or the Hearing Board—could arguably have a retroactive effect so as to give the semblance of legality to the clearance revocation dating back to 1953. Quite clearly the Supreme Court determination that this revocation was unlawful is not subject to a subsequent administrative determination that the revocation was lawful. That is particularly true where the purported effect of the latter determination might retroactively destroy a claim for loss in earnings.

19. On March 16, 1961, the said Director responded by re-emphasizing the Department's "willingness to process the question of Mr. Greene's current eligibility for access authorization under the provisions of the 1960 Review Regulation."

20. On April 14, 1961, plaintiff inquired of the said Director as to whether, pursuant to Paragraph V.B.1 of DOD Directive 5220.6, dated July 28, 1960, the Director had authority to reopen the case on his own motion and take such steps as might be deemed necessary to complete reconsideration without a formal request from the plaintiff.

21. On May 15, 1961, the said Director replied that "As has been indicated previously, this Department is prepared at Mr. Greene's request to undertake the processing of his case under the July 28, 1960 Review Regulation."

22. On June 1, 1961, the Deputy General Counsel of the Department of the Navy advised plaintiff that "In accordance with Department of Defense policy, it has been determined by the Department of Defense that Mr. Greene does

not qualify for monetary restitution under the provisions of Paragraph 26 and that, therefore, his claim, being premature, cannot be given further consideration at this stage of the administrative proceedings." It was further stated that "the Department of Defense has informed you that it is prepared at Mr. Greene's request to undertake the processing of his case under the July 28, 1960 Review Regula-
[fol. 7] tion, and that if he does so request, prompt action will be taken thereon."

23. The aforesaid July 28, 1960 Review Regulation has no application to plaintiff's claim for monetary restitution under Section 26, DOD Directive 5220.6, issued February 2, 1955, and plaintiff is not bound to exhaust any remedies under the July 28, 1960 Review Regulation before making such claim or bringing this suit.

24. The Secretary of Defense and/or his subordinates have refused and continue to refuse to make monetary restitution to the plaintiff as required by and in accordance with the decision of the Supreme Court in Greene v. McElroy, 360 U.S. 474, the subsequent order of expungement by the District Court, and the provisions of Section 26, DOD Directive 5220.6, issued February 2, 1955.

25. By virtue of the aforesaid regulation and judicial determinations, plaintiff is entitled to receive monetary restitution in an amount equal to the salary or pay which he would have earned at the rate he was receiving on the date of his suspension from employment by ERCO less his earnings from other employment. During the period from April 23, 1953, to April 23, 1962, plaintiff had earnings from other employment in the amount of $95,039.59. During the same period he would have had earnings from employment with ERCO, at the rate he was receiving on the date of his suspension, in the amount of $162,000.00.

26. By virtue of the foregoing illegal and unwarranted actions and refusals by the United States to grant plaintiff security clearances, augmented by the refusal to give plaintiff monetary restitution for the actual losses sustained by virtue of such illegal and unwarranted actions, plaintiff has also suffered permanent and irreparable loss to his reputa-

[fol. 8] tion and his professional career and his future earning capacity, constituting a deprivation of liberty and property in violation of the Fifth Amendment to the Constitution of the United States. Plaintiff is accordingly entitled to receive restitution, compensation or damages, by virtue of such deprivation, in an amount equal to the monetary restitution payable under Section 26, DOD Directive 5220.6, issued February 2, 1955, for the loss of earnings to the date of this petition, and for such amount as is equal to such monetary restitution for his future loss of earnings.

Eugene Gressman, 1730 K Street, N.W., Washington 6, D. C.;

Carl W. Berueffy, 650 Washington Building, Washington 5, D. C., Attorneys for Plaintiff.

[fol. 9]

IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

DEFENDANT'S MOTION TO SUSPEND PROCEEDINGS AND DENIAL THEREOF

Defendant moves to suspend proceedings in this case pending plaintiff's pursuit and completion of the administrative remedy available to him in the Department of Defense. In support of this motion, defendant states as follows:

This case is identical in all material aspects to the cases of *Kreznar* v. *United States*, C. Cls. No. 47-60, *Spector* v. *United States*, C. Cls. No. 48-60 and *Dressler* v. *United States*, C. Cls. No. 59-60. In these cases, the Court, by order filed June 22, 1962, directed that proceedings "* * * be and the same are suspended pending plaintiffs' pursuit and completion of the administrative remedies available through the Department of Defense, which proceedings are to be instituted and completed within a reasonable time." [fol. 11] In the instant case, plaintiff is suing for monetary restitution, just as are the plaintiffs in the *Kreznar*, *Spector* and *Dressler* cases, *supra*. Plaintiff relies on the

same statutes and regulations relied upon by plaintiffs in those three cases. Those cases were fully briefed and argued, including argument as to the scope and effect of the decision of the Supreme Court in *Greene* v. *McElroy*, 360 U.S. 474 (1959). After due deliberation, the Court ordered that they be suspended pending pursuit of the administrative remedy available in the Department of Defense.

Since the instant case is identical in all material aspects to the *Kreznar*, *Spector* and *Dressler* cases it should also be suspended pending pursuit and completion of the administrative remedy in the Department of Defense, and defendant requests that the Court so order.

Respectfully submitted,

/s/ Joseph D. Guilfoyle, Acting Assistant Attorney General, Civil Division.

/s/ Lawrence S. Smith, Attorney, Civil Division, Department of Justice

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[fol. 14]

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UNITED STATES COURT OF CLAIMS

No. 153-62

WILLIAM L. GREENE, Plaintiff,

vs.

THE UNITED STATES

DEFENDANT'S MOTION TO SUSPEND PROCEEDINGS

DENIED with defendant granted 30 days from the date hereof to file its answer: September 5, 1962.

W E D
William E. Day, Commissioner

[Stamp—Filed Jul 5 1962—COURT OF CLAIMS]

[fol. 30] [File endorsement omitted]

IN THE UNITED STATES COURT OF CLAIMS

No. 153-62

[Title omitted]

ORDER OF COMMISSIONER SUSPENDING PROCEEDINGS—December 5, 1962

In view of the action this day by the court in *Stephen L. Kreznar* v. *The United States*, No. 47-60, and *Novera Herbert Spector* v. *The United States*, No. 48-60, further proceedings herein are hereby suspended pending pursuit of administrative remedies by the Department of Defense.

/s/ William E. Day, Commissioner.

[fol. 31] [File endorsement omitted]

IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

PLAINTIFF'S REQUEST FOR REVIEW OF COMMISSIONER'S ORDER UNDER RULE 37(d)(5)—Filed December 10, 1962, AND DENIAL THEREOF—December 20, 1962

Pursuant to Rule 37(d)(5), plaintiff hereby requests that this Court review and vacate the *sua sponte* order of Commissioner William E. Day, entered on December 5, 1962,* on the ground that it was improvidently issued, represents an abuse of discretion and adversely affects substantial rights of the plaintiff. More particularly, plaintiff asserts:

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* The order reads: "In view of the action this day by the court in *Stephen L. Kreznar* v. *The United States*, No. 47-60, and *Novera Herbert Spector* v. *The United States*, No. 48-60, further proceedings herein are hereby suspended pending pursuit of administrative remedies by the Department of Defense."

Denied Dec 20 1962
DNL*
* Don N. Laramore, Acting Chief Judge.

1. On September 5, 1962, Commissioner Day denied the defendant's motion to suspend proceedings pending pursuit of administrative proceedings made available by the [fol. 32] Department of Defense. That motion was premised on this Court's orders in the *Kreznar* (No. 47-60), *Spector* (No. 48-60) and *Dressler* (No. 59-60) cases on June 22, 1962, suspending those proceedings until administrative remedies had been exhausted. Plaintiff herein filed an opposition to the defendant's motion and the defendant in turn replied to that opposition. Based upon a full consideration of the matter, *including this Court's actions in the other three cases*, the Commissioner denied the motion to suspend and ordered the defendant to file its answer.

Under Rule 37(d)(5), the Commissioner's order of September 5, 1962, denying the motion, became "the order of the Court unless within 5 days after the action thereon a dissatisfied party files with the Court a request for review of the Commissioner's action." No such request for review was filed by the defendant. And by virtue of the foregoing rule, the September 5 order became the order of this Court.

Thus the Commissioner lacked jurisdiction and authority to overrule or vacate what has become, by virtue of Rule 37(d)(5) the ruling of this Court. His order of December 5, 1962, cannot stand.

[fol. 33] 2. Plaintiff does not need or want any access authorization under the 1960 Directive. The administrative remedy said to be available to him has no relationship to this case or to any relief which he seeks. It has relevance only if plaintiff were in need of *present* security clearance, which need is not existent.

3. This case is *not* identical in all material respects with *Kreznar* v. *United States*, C.Cls. No. 47-60, *Spector* v. *United States*, C.Cls. No. 48-60, and *Dressler* v. *United States*, C.Cls. No. 59-60, wherein this Court on June 22, 1962, directed that proceedings be suspended pending pursuit of Department of Defense proceedings. Here, unlike the aforementioned three cases, there is a claim grounded not only in the provisions of Par. 26, DOD Directive 5220.6, 20 Fed. Reg. 1553 (Feb. 2, 1955), but also in the provision

of the due process clause of the Fifth Amendment of the United States Constitution (Paragraphs 2 and 26 of Petition). Where such a constitutional claim has been asserted, the doctrine of exhaustion of administrative remedies has no application. See *Soriano* v. *United States*, 352 U.S. 270, 274-275.

4. The doctrine of exhaustion of administrative remedies, moreover, has no relevance where, as here, the so-called administrative remedy is a permissive or alternative method of relief rather than a condition precedent to court action. Par. V.B.I. of DOD Directive 5220.6 (July 28, 1960), upon which defendant relies in this connection, provides in pertinent part:

> Decisions rendered under any industrial personnel review program prior to the effective date of this Regu- [fol. 34] lation which denied or revoked an access authorization *may* be reconsidered by such boards as the Director deems appropriate at the request of the applicant, after a finding by the appropriate board that there is newly discovered evidence or that other good cause has been shown. [Emphasis added.]

The use of the word "may" instead of "shall" in the foregoing regulation clearly indicates its permissive or discretionary nature, in distinction from any mandatory characteristic. And in that situation, it has been authoritatively determined that a claimant may waive such an alternative remedy and proceed at once to an adjudication in this Court. *Smithmeyer* v. *United States*, 147 U.S. 342, 357-358. Plaintiff's right of action against the United States has accrued and this Court has full jurisdiction over it pursuant to 28 U.S.C. §§1491 (1) and (3). The fact that there may be an alternative route of recovery is irrelevant. See also *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630, 634-636; and see *Ogden* v. *Zuckert*, 298 F. 2d 312, 317 (App. D.C.), and cases there cited.

5. As stated by the Supreme Court in *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 63, the doctrine of exhaustion of administrative remedies "applies where a

claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course.". Such is certainly not the case here.

[fol. 35] Far from failing to exhaust the pertinent administrative remedy, plaintiff has here made every conceivable effort to process his claim for monetary restitution before the appropriate administrative officials. See the facts set forth in Paragraphs 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23 of the Petition herein. Plaintiff made certain that all administrative avenues had been tried and exhausted before filing suit in this Court.

What the defendant is really proposing now is that the plaintiff seek administrative relief not as to the claim in issue here but as to a new and entirely different matter. A request for a hearing under Par. V.B.I. of the July 28, 1960, Directive is not one directed to the problem at issue in this case—i.e., the amount of monetary restitution, under Sec. 26 of the 1955 Directive, to which plaintiff is entitled in light of the Supreme Court's holding in *Greene* v. *McElroy*, 360 U.S. 474, that there was no authorization for the regulations under which plaintiff has been deprived of his job.

Rather the hearing envisaged by Par. V.B.I. of the 1960 Directive is one directed toward taking "such other steps as may be deemed necessary to complete reconsideration of the case." * What that plainly means is that the Director [fol. 36] can reconsider the problem of revocation *de novo* and take "such other steps as may be deemed necessary" to conclude that the original revocation was proper on its merits (despite its lack of authorization) and that it should be continued in effect. Thus could be wiped out any claim

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* The Director is also authorized, as the result of such hearing, "to vacate such final determination and all subsequent administrative action predicated thereon" if he finds the determination to have been unauthorized at the time it was made. Here, however, the Supreme Court has already found the determination unauthorized (360 U.S. 474) and the District Court has ordered all administrative rulings, orders and determinations relative to the unauthorized revocation annulled and expunged from the records of the United States Government. Paragraph 12 of Petition.

for restitution or damages under the 1960 Directive for the long period during which the revocation was unlawful for lack of authorization.

Additionally, the monetary claim here made under Par. 26 of the 1955 Directive is not the monetary claim which the Department of Defense would consider under the 1960 Directive. Section V.C. of the latter permits recognition of a monetary claim of the type here involved only if a new and favorable determination is made on the merits which is thought to be "clearly consistent with the national interest." Plaintiff maintains—and this is the heart of his case in this Court (see Paragraph 23 of Petition)—that he is not compelled to initiate a new and independent administrative proceeding under the 1960 Directive before seeking monetary recovery under the 1955 Directive for [fol. 37] a past illegal revocation. Plaintiff does not need or desire access authorization under the 1960 Directive.

In any event, the exhaustion doctrine can apply only where the available administrative relief is identical with that sought in court. *United States* v. *Western Pacific R. Co., supra.* That not being the case here, the suspension requested by the defendant is unwarranted.

6. To the extent that the 1960 Directive permits the Director in his discretion to reconsider the original revocation action, plaintiff is not required to exhaust such a reconsideration. As long ago as 1916 the Supreme Court held, *Prendergast* v. *New York Tel. Co.*, 262 U.S. 43, 48, that "As the law does not require an application for a rehearing to be made and its granting is entirely within the discretion of the Commission, we see no reason for requiring it to be made as a condition precedent to the bringing of a suit to enjoin the enforcement of the order." See also *United States* v. *Abilene & S.R. Co.*, 265 U.S. 274; *Levers* v. *Anderson*, 326 U.S. 219.

These authorities culminated in the enactment of Section 10(c) of the Administrative Procedure Act, 5 U.S.C. §1009 (c), providing that agency action otherwise ripe for judicial review "shall be final for the purposes of this subsection whether or not there has been presented or determined any application for . . . any form of reconsideration."

That command of Congress alone makes unnecessary any further request for administrative action.

[fol. 38] 7. Finally, exhaustion of administrative remedies is unnecessary where—as here—those remedies are clearly inadequate. See *Smith* v. *Illinois Bell Co.*, 270 U.S. 587, 591. The inapplicability of the doctrine is particularly clear where the judicial remedy involved depends upon a doubtful construction of a statute or regulation. See *Union Pacific Ry.* v. *Board*, 247 U.S. 282.

In this case, the administrative remedy is inadequate because, as already indicated, it involves different issues and different regulations than those involved in the case before this Court. The instant suit depends upon an interpretation and application of Par. 26 of the 1955 Directive, an issue which the proposed proceeding will not touch. No administrative proceeding could thus be more inadequate in this sense. And since this court action does involve a legal question as to the interpretation of Par. 26 of the 1955 Directive, not only is it impossible to expect any further administrative action thereon, but if the Director were to rule on the interpretation of Par. 26 it would not be binding or even particularly helpful to this Court. The entire issue, in other words, is presently before this Court and the Director's interpretation can be adequately formulated and argued by counsel for the defendant. No further administrative proceeding is necessary in these circumstances.

[fol. 39] Conclusion

For these various reasons, the Commissioner's order of December 5, 1962, should be reversed and vacated and the order dated September 5, 1962, should be reinstated as the order of this Court.

Respectfully submitted,

/s/ Eugene Gressman, 1730 K Street, N.W., Washington, D. C., Attorney for Plaintiff.

[fol. 40]

IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

DEFENDANT'S OPPOSITION TO PLAINTIFF'S REQUEST FOR REVIEW OF THE COMMISSIONER'S ORDER—Filed December 13, 1962

Defendant opposes plaintiff's request for review,[1] filed December 10, 1962, of the Commissioner's Order of December 5, 1962, directing suspension of proceedings pending pursuit of administrative remedies. The order of the Commissioner is proper; is in accord with the Court's action in three other cases, *Kreznar* v. *United States*, No. 47-60; *Spector* v. *United States*, No. 48-60; and *Dressler* v. *United States*, No. 59-60; and should not be vacated, as plaintiff requests.

In support of defendant's position, defendant states as follows:

I. Plaintiff's Points 1 through 7.

1. Point 1 of plaintiff's request for review states that on September 5, 1962 the Commissioner denied defendant's [fol. 41] motion to stay proceedings pending pursuit of administrative remedies; that defendant filed no request for review, as provided for in Rule 37; and that the order therefore became the order of the Court.

This is erroneous. The order of September 5, 1962 that was served on the defendant, denying defendant's motion to suspend, was an order of the Court, not an order of the Commissioner. It is on the Court's regular order form, issued by the Clerk. There is nothing on its face to show whether defendant's motion to suspend was considered by the Commissioner.

2. Point 2 of plaintiff's request for review states that he does not need or want any access authorization under

[1] Plaintiff inadvertently states that his request is made under Rule 37(d)(5) instead of Rule 37(d)(4). He apparently cites the January 16, 1961 text of the rule instead of the later version, effective March 15, 1962. The discrepancy is of no consequence insofar as this matter is concerned.

the 1960 Directive and that the "administrative remedy said to be available to him has no relationship to this case or to any relief which he now seeks." This is incorrect. The administrative remedy available in the Department of Defense is clearly relevant to his claim for money. This matter was fully briefed and argued in the *Kreznar*, *Spector* and *Dressler* cases. He can recover the monetary restitution in that administrative remedy which he seeks in this suit, and it is essential that he exhaust that remedy prior to proceeding further in this Court. In fact, the effect of the Supreme Court decision in his case, *Greene* v. *McElroy*, 360 U.S. 474 (1959), upon which he relies, was extensively briefed and argued in the *Kreznar*, *Spector* and *Dressler* cases. After hearing argument and considering the briefs of the parties, the Court ruled that the proceedings should be suspended while the administrative remedy was being exhausted. There is no reason to rule differently in the [fol. 42] instant case. Proceeding should be suspending while that remedy is being pursued; there is ample time, after the administrative process has been completed, for the Court to consider plaintiff's case if plaintiff can then show that the administrative remedy was inadequate or legally deficient. *Gusik* v. *Schilder*, 340 U.S. 128, 133 (1950).

3-7, inclusive. The text of points 3 through 7 of plaintiff's request for review is identical with points 1 through 5 of plaintiff's opposition, filed July 24, 1962, to defendant's motion to suspend proceedings. Therefore, defendant requests that its reply thereto, filed August 27, 1962, answering each of these points, be incorporated herein by reference in reply to these arguments.

II. The Supreme Court Has Held That Suspension Of Procedures Is The Proper Procedure.

The Supreme Court has held that even though the administrative remedy became available after a suit had been instituted in court, it must nevertheless be exhausted. *Gusik* v. *Schilder*, 340 U.S. 128 (1950). This point was made in the *Kreznar*, *Spector* and *Dressler* cases, and in defendant's reply to plaintiff's opposition to defendant's motion to suspend proceedings (point VI, pp. 5-6), filed

August 27, 1962. It is requested that this argument, which plaintiff has made no attempt to answer, also be incorporated herein by reference.

[fol. 43] Conclusion

This suit should be suspended while the administrative remedy in the Department of Defense is being pursued. The Commissioner's order, dated December 5, 1962, is correct and should be upheld by the Court.

Joseph D. Guilfoyle, Acting Assistant Attorney General, Civil Division.

Lawrence S. Smith, Attorney, Civil Division, Department of Justice.

[fol. 45] [File endorsement omitted]

[fol. 46]

IN THE UNITED STATES COURT OF CLAIMS

CLERK'S CERTIFICATE

I, Frank T. Peartree, Clerk, United States Court of Claims, do hereby certify that the foregoing are the original copies as filed in this court of the petition, defendant's motion to suspend proceedings, order of the commissioner denying defendant's motion to suspend proceedings, plaintiff's opposition to defendant's motion to suspend proceedings, defendant's reply to plaintiff's opposition to defendant's motion to suspend proceedings, order of commissioner suspending proceedings, plaintiff's request for review of commissioner's order under Rule 37(d)(5), order of the court denying plaintiff's request for review by Laramore, Acting Chief Judge, and of defendant's opposition to plaintiff's request for review of the commissioner's order, in the above-entitled case.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court at Washington, D. C., this 15th day of February, A. D., 1963.

(Seal)

Frank T. Peartree, Clerk, United States Court of Claims.

[fol. 47]

SUPREME COURT OF THE UNITED STATES

No. 887, October Term, 1962

WILLIAM L. GREENE, Petitioner,

vs.

UNITED STATES

ORDER ALLOWING CERTIORARI—April 22, 1963

The petition herein for a writ of certiorari to the United States Court of Claims is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 84

WILLIAM L. GREENE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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March 1, 1963.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

WILLIAM L. GREENE, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner William L. Greene prays that a writ of certiorari issue to review the order of the United States Court of Claims entered in the above entitled case on December 20, 1962.

THE ORDER BELOW

The Court of Claims filed no opinion. Its unreported order of December 20, 1962, denying review of Commissioner Day's order of December 5, 1962, is reprinted in the Appendix hereto (*infra*, p. 1a), together with Commissioner Day's order.

JURISDICTION

The order of the Court of Claims (R. 31), signed by Acting Chief Judge Laramore on December 20, 1962, denied petitioner's request for a review of Commissioner Day's order of December 5, 1962 (R. 30), suspending further proceedings "pending pursuit of administrative remedies by the Department of Defense." Under Rule 37(d)(4) of the Court of Claims Rules, the order of the Commissioner became the order of the Court by virtue of such denial of review. The jurisdiction of this Court rests on 28 U.S.C. § 1255 (1).

QUESTIONS PRESENTED

1. Does this Court's decision in *Greene* v. *McElroy*, 360 U.S. 474, contemplate and direct that one deprived of a job by Defense Department officials, whose actions were found by this Court to be unauthorized, shall receive monetary restitution for back pay losses in accordance with applicable regulations (Par. 26, Dept. of Defense Directive 5220.6, 20 Fed. Reg. 1553, February 2, 1955) or the Fifth Amendment to the Constitution of the United States?

2. Was it proper for the Court of Claims to suspend, without reaching the merits, a suit for monetary restitution under the aforesaid 1955 regulation and the Fifth Amendment and to remit the plaintiff to further proceedings before the Department of Defense under DOD Directive 5220.6, 25 Fed. Reg. 7523, issued July 28, 1960?

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

This case involves the Fifth Amendment of the United States Constitution; and Department of Defense Directive 5220.6, 20 Fed. Reg. 1553, issued February 2, 1955; and Department of Defense Directive 5220.6, 25 Fed. Reg. 7523, issued July 28, 1960. These are reprinted in pertinent part in Appendix B, *infra*.

STATEMENT OF THE CASE

A. Introduction

Prior to April 23, 1953, petitioner William L. Greene was vice-president and general manager of Engineering and Research Corporation (ERCO). On that date he was discharged by ERCO due to revocation of his security clearance by the Department of the Navy. In *Greene* v. *McElroy*, 360 U.S. 474, this Court held that the action of the Department was not validly authorized and that the officials of the Defense Department "were not empowered to deprive petitioner of his job" as they had done; thereafter, the District Court ordered that "any or all rulings, orders, or determinations wherein or whereby plaintiff's security clearance was revoked are hereby annulled and expunged" from all Government records. (R. 4).

Petitioner then made formal demand on the Government for monetary restitution for loss of earnings pursuant to the applicable regulation, Section 26 of the Industrial Personnel Security Review Regulation DOD 5220.6, 20 Fed. Reg. 1553 (1955). Restitution was denied. Petitioner accordingly brought this suit in the Court of Claims for loss of earnings, basing his claim on the aforesaid regulation and the Constitution of the United States. (R. 7-8). The Court of Claims,

without expressing any view on the merits, entered an order (R. 30-31) suspending all proceedings before it pending Greene's institution of proceedings before the Department of Defense under a 1960 Regulation adopted following the decision in *Greene* v. *McElroy*. This procedure would require a hearing to determine whether petitioner is *presently* entitled to access clearance, a clearance which petitioner does not need or want, and, in the event of a favorable determination, empowers the Secretary of Defense *in his discretion* to award restitution. On the other hand, an unfavorable determination as to petitioner's present access clearance would, under the Government's theory, lead to a denial of any and all restitution.

Petitioner seeks review of that order, and a judgment of this Court that his claim is valid, or alternatively, a direction to the Court of Claims to adjudicate the merits of his claim without requiring prior resort to the procedure under the 1960 Regulation.

B. The Facts On Which Petitioner's Claim Is Based

The facts on which petitioner bases his claim may be sketched briefly here, for they are fully narrated in this Court's opinion in *Greene* v. *McElroy*, 360 U.S. 474 at 476-491.

(1) Greene, an aeronautical engineer, began work for ERCO in 1937 and, except for a brief leave of absence, remained with the firm until his discharge in 1953, having risen to be one of its chief executives because of the "excellence of his work", 360 U.S. at 476. ERCO, a firm devoted primarily to developing and manufacturing mechanical and electrical parts, performs classified work for various armed services. In

connection with this work, Greene had thrice obtained security clearances, two of them for Top Secret.[1]

(2) On December 11, 1951, petitioner was informed by the Army-Navy-Air Force Personnel Security Board (PSB) that "access by you to contract work and information [at ERCO] . . . would be inimical to the best interests of the United States" and that his clearances were being revoked. He was also advised that he could seek a hearing before the Industrial Employment Review Board (IERB), and petitioner took that course of action. Petitioner, with counsel, appeared at hearings before the IERB with respect to certain allegations made about his past associations. The Government presented no witnesses at these hearings and petitioner had no opportunity to confront or question persons who had allegedly made statements adverse to him. On January 29, 1952, on the basis of these hearings and of the confidential reports, the IERB reversed the action of the PSB and informed petitioner and ERCO that petitioner was authorized to work on secret contract work.

(3) On April 17, 1953, following the abolition of the PSB and the IERB, the Secretary of the Navy wrote ERCO that, on a review of the case, he had concluded that petitioner's "continued access to Navy classified security information [was] inconsistent with the best interests of National Security." No hearing preceded

[1] On August 9, 1949, petitioner had been given a confidential clearance by the Army. On November 9, 1949, petitioner had been given a top secret clearance by the Assistant Chief of Staff G-2, Military District of Washington. On February 3, 1950, petitioner had been given a top secret clearance by the Air Material Command. All of these clearances were pursuant to industrial security requirements contractually imposed upon ERCO employees.

this notification. The Secretary further requested ERCO to exclude petitioner "from any part of your plants, factories or sites at which classified Navy projects are being carried out [and] to bar him access to all Navy classified information." ERCO had no choice but to comply with this request and petitioner was in fact discharged by ERCO on April 23, 1953. On October 13, 1953, petitioner was advised that the Navy had requested the Eastern Industrial Personnel Security Board (EIPSB) to make a final determination concerning petitioner's status. A hearing before the EIPSB took place on April 28, 1954, again without any confrontation by petitioner of adverse witnesses, if any. Thereafter the EIPSB affirmed the action of the Secretary of the Navy and ruled that granting clearance to petitioner for access to classified information was "not clearly consistent with the interest of national security." On September 16, 1955, petitioner requested review by the Industrial Personnel Security Review Board. On March 12, 1956, petitioner received a letter from the Director of the Office of Industrial Personnel Security affirming the determination of the EIPSB.

(4) In 1954, following the EIPSB determination, petitioner filed a complaint in the United States District Court for the District of Columbia asking for a declaration that the revocation of his clearance was unlawful, for an order restraining Department of Defense officials from acting pursuant to such revocation, and for an order requiring such officials to advise ERCO that the revocation was void. The District Court granted the Government's motion for summary judgment, 150 F. Supp. 958, and the Court of Appeals affirmed, 254 F. 2d 944 (App. D.C.).

(5) Petitioner obtained review of the Court of Appeals judgment in this Court. On June 29, 1959, this Court held that "in the absence of explicit authorization from either the President or Congress [the Secretaries of the armed forces] were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." *Greene* v. *McElroy*, 360 U.S. 474 at 508.

On December 14, 1959, pursuant to the decision and judgment of this Court, the District Court ordered "that the action of the Secretary of Defense and his subordinates in finally revoking plaintiff's security clearance was and the same is hereby declared to be not validly authorized" and "that any or all rulings, orders, or determinations wherein or whereby plaintiff's security clearance was revoked are hereby annulled and expunged from all records of the Government of the United States." (R. 4). Thereby expunged were the adverse determinations of the PSB (Dec. 11, 1951), the Secretary of the Navy (April 17, 1953), the EIPSB (May 30, 1954), and the Director of the Office of Industrial Personnel Security (March 12, 1956). Left on the record and in effect were the three security clearances obtained prior to Dec. 11, 1951, and the IREB order of Jan. 29, 1952, authorizing petitioner to work on secret contract work.

C. Petitioner's Attempts to Obtain Restitution From the Defense Department

(1) On December 28, 1959, petitioner made a formal demand on the General Counsel of the Department of the Navy "for monetary restitution from the Department of the Navy and/or the Department of Defense

pursuant to Section 26 of the Industrial Personnel Security Review Regulation, 20 Fed. Reg. 1553." (R. 4).

(2) On January 11, 1960, the General Counsel of the Department of the Navy acknowledged the demand and requested that certain dates and financial data be supplied, stating that if such information were supplied the claim would receive "such consideration as it deserves." A statement of Greene's legal position respecting the applicability of Section 26 was also requested. (R. 4).

(3) On April 20, 1960, petitioner supplied the General Counsel of the Department of the Navy with the requested information and statement of legal position. He stated under oath that he had incurred a $49,960.41 loss of earnings from April 23, 1953, the date of his dismissal, up to December 31, 1959. (R. 4-5).

(4) On January 4, 1961, having been advised that his claim had been forwarded to the Director of the Office of Security Policy of the Department of Defense for final determination, petitioner renewed his claim in a letter addressed to the said Director. Petitioner, understanding that the Director was disposed to deny the claim, also requested an opportunity to know and rebut the legal representations made in support of any disposition to deny the claim. (R. 5).

(5) On February 8, 1961, the said Director responded that Greene might submit in writing any additional material as to his legal position by March 3, 1961. The Director also stated that "this Department is prepared, at his [Greene's] request, to consider his case under the above-mentioned 1960 Review Regulation [Industrial Personnel Access Authorization Re-

view Regulation, DOD Directive 5220.6, dated July 28, 1960] and to take such action as may be necessary to reach a final determination as to whether it is in the national interest to grant him an authorization for access to classified information." (R. 5).

(6) On March 2, 1961, Greene wrote to the said director restating his legal position as to the applicability of Section 26 and declining to request a reconsideration of his case under the 1960 regulation. He therein stated that he could not

> . . . agree to any procedure which might result in a new, adverse determination which could then be used by the Department to bolster the argument that Section 26 does not apply to this case. And such a possible determination—whether made by the Screening Board or the Hearing Board—could arguably have a retroactive effect so as to give the semblance of legality to the clearance revocation dating back to 1953. Quite clearly the Supreme Court determination that this revocation was ununlawful is not subject to a subsequent administrative determination that the revocation was lawful. That is particularly true where the purported effect of the latter determination might retroactively destroy a claim for loss in earnings. (R. 5-6).

(7) On March 16, 1961, the said Director responded by re-emphasizing the Department's "willingness to process the question of Mr. Greene's current eligibility for access authorization under the provisions of the 1960 Review Regulation." (R. 6).

(8) On April 4, 1961, Greene inquired of the said Director as to whether, pursuant to Paragraph V.B. 1 of DOD Directive 5220.6, dated July 28, 1960, the Director had authority to reopen the case on his own motion and take such steps as might be deemed neces-

sary to complete reconsideration without a formal request from Greene (R. 6).

(9) On May 15, 1961, the said Director replied that "As has been indicated previously, this Department is prepared at Mr. Greene's request to undertake the processing of his case under the July 28, 1960 Review Regulation." (R. 6).

(10) Finally, on June 1, 1961, the Deputy General Counsel of the Department of the Navy advised plaintiff that "In accordance with Department of Defense policy, it has been determined by the Department of Defense that Mr. Greene does not qualify for monetary restitution under the provisions of Paragraph 26 and that, therefore, his claim, being premature, cannot be given further consideration at this stage of the administrative proceedings." It was further stated that "the Department of Defense has informed you that it is prepared at Mr. Greene's request to undertake the processing of his case under the July 28, 1960 Review Regulation, and that if he does so request, prompt action will be taken thereon." (R. 6-7).

D. Proceedings in the Court of Claims

Petitioner filed this suit in the Court of Claims on May 7, 1962, alleging the facts stated above, and claiming that he was entitled to monetary restitution "in an amount equal to the salary or pay which he would have earned at the rate he was receiving on the date of his suspension from employment by ERCO less his earnings from other employment."[2] (R. 7). Petitioner

[2] During the period from April 23, 1953, to April 23, 1962, plaintiff had earnings from other employment in the amount of $95,039.59. During the same period he would have had earnings from employment with ERCO, at the rate he was receiving on the date of his suspension, in the amount of $162,000.00. (R. 7).

based his claim on the Fifth Amendment and Par. 26 of the 1955 Directive. (R. 7-8).

The United States did not file an answer within the original allotted time.[3] Before the extended time for filing the answer had elapsed, Commissioner Day *sua sponte* entered an order (R. 30) on December 5, 1962, reading as follows:

> "In view of the action this day by the court in *Stephen L. Kreznar* v. *The United States*, No. 47-60, and *Novera Herbert Spector* v. *The United States*, No. 48-60, further proceedings herein are hereby suspended pending pursuit of administrative remedies by the Department of Defense."[4]

The "administrative remedies" referred to, while as yet not pinpointed by the Government, presumably are those in Par. V.C. of the DOD Directive 5220.6, adopted in 1960 following the *Greene* decision. That paragraph states that reimbursement for loss of earnings "may be allowed" following a final administrative determination that access authorization is *presently* consistent with the national interest and where the prior

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[3] The Government had filed a motion to suspend proceedings on July 5, 1962. (R. 9). Petitioner filed objections thereto (R. 15), and on September 5, 1962, Commissioner Day denied the motion (R. 14) and granted the Government 30 days to file its answer. The Government's failure to seek review of Commissioner Day's denial of the motion within five days made such action that of the Court of Claims under Rule 37(d)(4) of that court. The Government did not renew its motion. Commissioner Day's order of December 5, 1962, suspending proceedings was *sua sponte*.

[4] The action of the Court of Claims on "this day"—December 5, 1962—in *Kreznar* and *Spector* related to denials of leave to file further petitions for rehearing in light of the September 5 order of Commissioner Day in the instant case (which had become the order of the court, see footnote 3, *supra*) denying the Government's motion to suspend.

adverse determination has been found "unjustified." In other words, the 1960 Directive said to be now available to petitioner places three conditions on monetary restitution: (1) a final administrative determination that access clearance is presently consistent with the national interest, (2) an administrative determination that the prior removal of clearance was unjustified, and (3) a favorable exercise of administrative discretion that reimbursement would be justified.

Pursuant to Rule 37(d)(4) of the Court of Claims, petitioner duly requested review of Commissioner Day's order. Petitioner claimed that the order was inconsistent with this Court's decision in *Greene* v. *McElroy,* 360 U.S. 474, that the doctrine of administrative remedies had no application under these circumstances, and that his right to monetary restitution was vested and immune from administrative disfeasance. (R. 31-39). Petitioner further stated that he "does not need or want any access authorization under the 1960 Directive." (R. 33).

On December 20, 1962, Acting Chief Judge Laramore on behalf of the Court of Claims denied the request for review, thereby under Rule 37(d)(4) making Commissioner Day's order of suspension that of the Court of Claims.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is Contrary to Greene v. McElroy, 360 U.S. 474

The decision below that petitioner's claim for monetary restitution is dependent on exhaustion of further administrative proceedings is in direct conflict with the determination of petitioner's rights by this Court in *Greene* v. *McElroy,* 360 U.S. 474. In that case the

Court held (360 U.S. at 508) that Defense Department officials "*were not empowered to deprive petitioner of his job* in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." [Emphasis added.] Having been illegally deprived of his job, petitioner necessarily became entitled to appropriate restitution for the losses suffered as a result of that illegal deprivation.

On remand following this Court's opinion and judgment in *Greene*, the District Court in this case entered an order annulling and expunging from all Government records "any or all rulings, orders, or determinations wherein or whereby plaintiff's security clearance was revoked." (R. 4). Up to the present moment, therefore, Greene is a man who has been illegally deprived of his job and who has no adverse security determinations on his record during the period of that illegal deprivation. It is plainly impermissible to say, as the court below did, that his right to monetary restitution now depends upon some sort of retroactive or *ex post facto* administrative proceeding, whereby a new and needless determination of access eligibility is to be made. A right declared by this Court to have been improperly invaded is not thereafter subject to administrative disfeasance.

That Greene's right to recover for the illegal loss of his job was among the considerations before the Court at the time of the *Greene* decision is readily apparent. In the companion case, *Taylor* v. *McElroy*, 360 U.S. 709, argued immediately prior to *Greene*, the Government urged that the matter was moot because, after certiorari had been granted, the Secretary of Defense had determined that Taylor was eligible for access

clearance and had expunged all adverse determinations. The Solicitor General stated orally, in response to a question from the Bench, that Taylor was "eligible under applicable regulations for compensation for wages lost during the time he was unemployed due to the clearance revocation and denial." 360 U.S. at 711. This representation, which was accepted by the Court in agreeing that the case was moot, was necessarily based on Paragraph 26 of the 1955 Defense Department Directive,[5] one of the bases for Greene's claim in the instant proceeding. Greene and Taylor had sought the same relief in their District Court complaints and the mootness issue turned on whether the Government had afforded Taylor sufficiently complete relief that he would not be disadvantaged by failure to get an appropriate order from the District Court. Neither the Solicitor General nor Assistant Attorney General Doub (who argued the *Greene* case) gave any hint that in the event of a judgment favorable to him, on the issues raised, Greene would not be eligible for compensation under the same Paragraph 26.[6]

Further explicit evidence that the Court intended or understood that its decision would result in monetary reimbursement to Greene is the dissenting opinion of Mr. Justice Clark, who objected that the *Greene* decision "subjects the Government to multitudinous ac-

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[5] Paragraph 26 provides in pertinent part as follows:

"In cases where a final determination is favorable to a contractor employee, the department whose activity originally forwarded the case to the Director will reimburse the contractor employee in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance."

[6] While the transcript of the oral argument is not available to petitioner, the recollection of counsel on this matter is supported by the report of the argument at 27 U.S. Law Week 3275-3280.

tions—and perhaps large damages—by reason of discharges made pursuant to the present procedures", 360 U.S. 474, 510 at 523-24.[7] Neither the majority opinion nor the concurrence of Mr. Justice Harlan contradicted Mr. Justice Clark's assertion regarding the Government's potential liability.

If the Court had not intended this result it is highly likely that it would have said so, since the reimbursement program of Paragraph 26 was discussed in the Court's opinion (360 U.S. at 504-505) in connection with the Government's contention that Congress had ratified the program. The Government had relied on Hearings Before the House Committee on Appropriations on Department of Defense Appropriations for 1958, 84th Cong., 1st Session, pp. 774-781. In the course of those hearings the following colloquy concurred:

> MR. WHITTEN: "What basis would there be for us paying him anything? There is no relationship which puts any responsibility upon the Federal Government."
>
> GENERAL MOORE [Special Assistant to the Comptroller, Department of Defense]: "There is certainly, I believe, one of equity and justice. These employees that we are talking about being relieved, even though temporarily, are being relieved at the suggestion of representatives of the Federal Government." (id. at 777.)

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[7] Earlier in his opinion Mr. Justice Clark had written: "But the action today may have the effect of by-passing that exemption since Greene will now claim, as has Vitarelli, see *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), reimbursement for his loss of wages. See *Taylor* v. *McElroy*, *post*, p. 709. This will date back to 1953. His salary at that time was $18,000 a year." Indeed, the computation of Greene's present back-pay claim involves the fact that he received $18,000 a year from the job of which he was deprived.

This testimony cannot have escaped the Court's attention, since its opinion in *Greene* evinces a careful study of those hearings.[8]

In the court below, the Government argued that this Court's *Greene* decision related only to the proceedings before the appeal boards (IERB and EIPSB) and not to the original charges, actions and tentative decision of the screening board (PSB).[9] The decision was said to relate only to improper administrative appellate procedure rather than to the substance or effectiveness of the original adverse security determinations.

The holding of the *Greene* case cannot be so restricted or nullified. When this Court ruled that the

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[8] See particularly 360 U.S. at 505, n. 30, stating that a certain passage was the "*only* description made to the Committee concerning the procedures used in the Department's clearance program". (Emphasis added). This assertion presupposes an examination of the entire testimony.

The Government's brief had cited, but not discussed this testimony. Brief for Respondents, No. 180, Oct. Term, 1958, p. 27, n. 8.

[9] The Government asserted below (R. 9) that the instant case "is identical in all material aspects" to *Kreznar* v. *United States*, Ct. Cl. No. 47-60, in which a petition for certiorari is being filed this day. In the response to the plaintiff's motion for summary judgment, etc. pp. 22-23 in *Kreznar* (pp. 109-110 of the record of that case in this Court) the Government argued as follows:

> "Consequently, the Supreme Court's decision means only that the Department of Defense was required to revise its procedure in order to conform to the Court's mandate. It means only that the action finally depriving the individual of his job without the right of confrontation and cross-examination was not authorized and is not binding. It does not mean that, because of this shortcoming in the proceedings, the Statement of Reasons, which set forth the charges, or the initial action of the Screening Board, have been vacated. These remain outstanding, just as the original suit remains pending when a higher court finds error in the lower court's handling of the case and remands it for retrial."

procedures whereby Greene was deprived of his job were unauthorized, it meant all procedures leading to that deprivation. And the initial actions and determinations of the screening board which caused Greene to be separated from his job (see 360 U.S. at 476-477) were an integral part of those procedures. The absence of authority which this Court found in *Greene* encompassed all actions leading to the loss of employment. To read the decision otherwise, as the Government would do, is to attribute to this Court the paradoxical holding that hearings before the appeal boards that lacked basic due process were unauthorized, but that unilateral action by a screening board that accorded no hearing or due process whatever and that effectively removed him from his job must be considered authorized and still in effect. Such an analysis refutes itself.[10]

In support of its stultifying analysis, the Government cited only the concurring opinion of Mr. Justice Harlan in the *Greene* case, 360 U.S. at 509-510. But Mr. Justice Harlan there made no reference to the continuing efficacy of prior screening board actions. He merely pointed out that the basic issue in *Greene* was "not whether petitioner is entitled to access to classified material" and that "nothing in the Court's opinion . . . suggests that petitioner must be given access to classified material."

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[10] Moreover, quite apart from this Court's opinion in *Greene*, the ensuing order of the District Court, entered by consent on remand, clearly annulled and expunged "any or all rulings, orders, or determinations wherein or whereby plaintiff's security clearance was revoked." It cannot be seriously contended that the rulings, orders, or determinations of the screening board are not encompassed by that order.

The fact that the Court in *Greene* did not determine that Greene was entitled to access, of course, is not relevant to his right to restitution for illegal loss of his job. Denial of present access clearance, if such be the case here, is clearly consistent with payment for losses resulting from improper or unlawful revocation of past access clearance. And where, as Mr. Justice Harlan noted (360 U.S. at 508), there was no authorization for the procedures invoked in the revocation of Greene's clearance, it follows that the right to restitution for the resulting injury becomes essential if the "equity and justice" promised by the Department of Defense are to prevail.[11]

The intent and the command of the *Greene* decision are clear. The order below cannot stand in light thereof.

2. The Question of Petitioner's Right to Just Compensation Is Important and Substantial

In addition to his claim under the 1955 regulation, petitioner relies in this suit on the Fifth Amendment, which entitles him, without regard to further administrative proceedings, to just compensation for the job of which he was deprived. This question is of the utmost importance, since it directly affects the right to employment of the millions of Americans presently covered by the Industrial Personnel Security Program, plus the millions of others who may come under it in the

[11] For purposes of achieving such "equity and justice", and possibly in order to avoid Fifth Amendment claims as to just compensation, the "final determination . . . favorable to a contractor employee" referred to in Paragraph 26, DOD 5220.6, 25 Fed. Reg. 1535 (1955), is not to be confined to final determinations of present access clearance. The phase also relates to a final determination by this Court or any other final authority that the procedures used in revoking a prior access authorization were illegal or unauthorized.

foreseeable future; plainly, the nation's defense production is likely to increase rather than diminish.[12] And in a larger sense all citizens have a stake in the fundamental question whether the government may, in the pursuit of some public policy, destroy the livelihood of one of their number without reimbursing him for his loss. We think that the question was answered by the adoption of the Bill of Rights: "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole". *Armstrong* v. *United States*, 364 U.S. 40, 49.

The importance of the question being clear, elaboration of the merits would be inappropriate in this petition. Suffice it to say that the same Constitution which requires just compensation when the Government deprives a person of his contract to build a ship,[13] or of the enjoyment and use of his own land,[14] or his right

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[12] Rather surprisingly, the exact figures on the number of individuals currently affected is apparently unavailable. In March, 1962, the Deputy Assistant Secretary of Defense for Security Policy, Mr. Walter T. Skallerup, Jr., estimated that "the cumulative total number of access authorization granted in industry since 1949 is 5,000,000." Hearings Before the Committee on Un-American Activities, House of Representatives—Relating to H.R. 10175, etc. (87th Cong. 2nd Session), p. 460. This is already a substantial increase from the figure three and one-half years earlier (November 21, 1958) of approximately 3,300,000 reported by the Government in its brief in *Greene* v. *McElroy*. Brief for Respondents, No. 180, Oct. Term, 1958, p. 16, n. 6a.

[13] *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106.

[14] *United States* v. *Causby*, 328 U.S. 256.

to flood another's land[15] requires the Government to make whole the citizen whose livelihood it has destroyed.[16]

3. The Suspension of Proceedings Was Contrary to Proper Judicial Administration

The court below, without passing on the merits of petitioner's claim, and without stating the reasons for its action, suspended proceedings in petitioner's suit "pending pursuit of administrative remedies by the Department of Defense." We submit that the court thereby parted from the proper and usual course of judicial administration.

The seriousness of the court's error and the hardship on petitioner in requiring him to proceed before the Defense Department are clear when the precise issues which were before the court, and the proposed administrative remedy, are considered and contrasted: Petitioner's claim for relief presented no question of fact (except the calculation of the amount due) and two questions of law: 1) Whether he has a right to

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[15] *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624.

[16] The Defense Department apparently adheres to the view that it has no obligations to those whom it wrongfully deprives of their jobs. That is the import of their new regulations which make reimbursement a matter of grace; even where the employee obtains what the Department itself considers to be "a final favorable determination that the administrative determination which resulted in the loss of earnings was unjustified," it provides only that "reimbursement *may* be allowed". (DOD Directive 5220.6, issued July 28, 1960, Par. V.C.). After *Greene* v. *McElroy*, *supra*, this narrow view is no longer tenable. See also *Hannah* v. *Larche*, 363 U.S. 420, 451, where the Security Clearance Boards in *Greene* were stated to "have made determinations in the nature of adjudications affecting legal rights."

reimbursement under the 1955 regulation; and 2) whether he has such right under the Constitution. Neither of these questions would be answered in the proceedings before the Defense Department, which has already failed to honor his claims under the Regulation (see pp. 7-10, *supra*) and is plainly without power to decide the constitutional question. The issue which the Defense Department offers to decide are petitioner's right under the *1960* regulation which, the Government has asserted, depends in part on whether he would presently be granted access clearance. Thus, the Court of Claims' order requires petitioner to submit to another Security Board hearing and to obtain access authorization for the future as preconditions to an adjudication of his right to reimbursement for the loss of his job in the past due to the unauthorized action of the earlier Boards.

The order of the court below is contrary to the principles of "sound and expeditious judicial administration" enunciated in *Southwestern Sugar Company v. River Terminals Corp.*, 360 U.S. 411. In that case the district court had entered judgment for plaintiffs, and defendants had raised four claims of error on appeal. One of these claims of error raised an issue which required preliminary consideration by the Interstate Commerce Commission, while each of the other three could have been considered by the Court of Appeals and would have been dispostive of the case if sustained. The Court of Appeals dealt only with the former issue and remitted the parties to the Interstate Commerce Commission. This procedure was held to be error:

> "At the outset, we hold that the Court of Appeals erred in ordering what was in substance a referral of the issue of the validity of the exculpa-

tory clause to the Commission without first passing on the other claims of error tendered by respondent below. As we have noted, those other claims, if accepted, would have required a reversal of the judgment of the District Court and the entry of judgment for respondent. The case had been fully argued before the Court of Appeals, and those claims were plainly ripe for decision.

"Under these circumstances, we think that sound and expeditious judicial administration should have led the Court of Appeals not to leave these issues undecided while a course was chartered requiring the institution and litigation of an altogether separate proceeding before the I.C.C.—a proceeding which might well assume substantial dimensions—to test the sufficiency of only one of respondent's several defenses. If in consequence of findings made by the Commission in such a proceeding it should be determined that the exculpatory clause cannot be given effect, the Court of Appeals would then have to decide the very questions which it can now decide without the necessity for any collateral proceeding. Conversely, a present ruling on those other questions might entirely obviate the necessity for proceedings in the Commission which would further delay the final disposition of this already protracted litigation. We conclude, therefore, that the Court of Appeals should have passed upon those issues as to which the expert assistance of the I.C.C. is concededly not appropriate, before invoking the processes of the Commission." 360 U.S. at 414-15.

A determination favorable to petitioner regarding his rights either under the 1955 regulation or under the Fifth Amendment would be dispositive of the case, and proceedings before the Defense Department cannot shed light on either of these issues. Thus, even if the Defense Department proceedings were relevant to

some issues, the *Southwestern Sugar* case would require the Court of Claims to settle petitioner's rights under the 1955 regulation or under the Fifth Amendment before turning to the issues which require prior administrative consideration. But since petitioner's rights under the 1960 regulation (which alone are offered to be resolved by the Defense Department) are entirely irrelevant to any issue before the Court of Claims, the doctrine of exhaustion of administrative remedies should not come into play at all. As stated in *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 359, 63, that doctrine "applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process had run its course."[17] Such is certainly not the case here.

The irrelevancy of the administrative proceeding to the issues before the Court of Claims is one of several reasons why *Gusik* v. *Schilder*, 340 U.S. 128, on which the Government relied heavily below, is inapposite. *Gusik* was a *habeas corpus* case to review the action of a court martial. The issues which Gusik sought to raise on *habeas corpus* could, under Article 53 of the Articles of War, be determined by the Judge Advocate General, and a new trial awarded. Moreover, the new remedy which Gusik was required to exhaust was one prescribed by Congress in the Articles of War and not, as here, by the Defense Department. The doctrine of exhaustion of administrative remedies properly respects the procedures which Congress had established for judicial review. See e.g. *Myers* v. *Bethlehem Ship-*

[17] This statement was quoted with approval in *United States* v. *R.C.A.*, 358 U.S. 334, 346, n. 14.

building Corp., 303 U.S. 41, 48-50. It was not intended to empower agencies to subject parties to an unending succession of administrative procedures and thereby to postpone indefinitely the day of reckoning in court. Such agency action is all the less permissible where the new procedure was instituted, as here, *post litem motam.*

The course required by the order below is subject to other substantial objections. If petitioner proceeds as directed before the Department of Defense and if the Department decides adversely to him, he may be seriously prejudiced in his suit in the Court of Claims, for it would appear to be the logic of the Government's position—although the Court of Claims did not so hold—that petitioner is entitled to reimbursement for his past loss earnings *only* if he is now determined to be eligible for access clearance in the future and *only* if the prior and expunged adverse determinations are now found to be "unjustified" on the merits. But the purported remedy before the Defense Department is by its own terms discretionary, for even if access authorization is granted and if it is determined that the prior revocation was unjust, reimbursement "*may* be allowed." See par. V.C. p. 3a, *infra.* (Emphasis supplied.) *Smithmayer* v. *United States,* 147 U.S. 342, 357-58, holds that the jurisdiction or adjudicatory duty of the Court of Claims cannot be ousted by the possibility of such a discretionary remedy.[18]

[18] Moreover, factual determinations of the Department would presumably not be judicially reviewable. And the statutory and constitutional validity of the procedures would be reviewable, if at all, only in the district courts. See *Pennsylvania Railroad Co.* v. *United States,* 363 U.S. 202; *Almour* v. *Pace,* 193 F. 2d 699 (App. D.C.). Thus for example, if Greene were again denied confrontation of adverse witnesses, as the 1960 regulation would still permit, he would be required to institute a new suit to determine whether the application of such procedures is valid.

Finally, even if the other conditions for requiring exhaustion had been met, the doctrine could not properly be invoked in this case because of the nature of the proposed remedy. This Court, having studied the record of petitioner's previous security hearings,[19] and of other similar hearings as well,[20] will readily understand why petitioner is unwilling to endure another. Apart from their procedural inadequacies, such hearings violently intrude into the individual's privacy, subjecting his entire life to hostile scrutiny. There is no need to consider here whether they are a necessary and proper price for the preservation of government secrets. Petitioner does not seek access clearance. This is a suit for money. It should be tried by the courts, not by a security board.

CONCLUSION

By reason of the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE GRESSMAN
GEORGE KAUFMANN
1730 K Street, N. W.
Washington 6, D. C.

CARL W. BERUEFFY
210 Mercantile Bank Building
Boulder, Colorado

Attorneys for Petitioner

March 1, 1963.

[19] Proceedings of January 23, 1952 before the Industrial Employment Review Board, Transcript of Record, No. 180, Oct. Term 1958, pp. 39-171; proceedings of April 28, 29, 30, 1954 before the Eastern Industrial Personnel Security Board, *Ibid.* pp. 184-461.

[20] See e.g. *Vitarelli* v. *Seaton*, 359 U.S. 535, particularly note 5, pp. 542-544.

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 153-62

(Issued December 5, 1962)

WILLIAM L. GREENE, *Plaintiff*,

v.

THE UNITED STATES, *Defendant*.

Order

In view of the action this day by the court in *Stephen L. Krezmar* v. *The United States*, No. 47-60, and *Novera Herbert Spector* v. *The United States*, No. 48-60, further proceedings herein are hereby suspended pending pursuit of administrative remedies by the Department of Defense.

/s/ WILLIAM E. DAY
William E. Day, *Commissioner*.

Inscribed on bottom of first page of plaintiff's request for review of Commissioner's order under Rule 37 (R. 31):
"DENIED DEC. 20, 1962 /s/DNL"*

Clerk's Office
Washington, D. C., December 20, 1962

To Attorney of Record and Assistant Attorney General, and Commissioner

Sirs:

Please take notice that in the above-entitled cause there has been entered this day on the plaintiff's request for review of Commissioner's order under Rule 37, the following order:

DENIED.

Very truly yours,

FRANK T. PEARTREE
Clerk, Court of Claims

---

* Don N. Laramore, Acting Chief Judge.

APPENDIX B

United States Constitution, Amendment V:

> No person shall be * * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Department of Defense Directive 5220.6, 20 Fed. Reg. 1553, issued February 2, 1955: * * * par. 26:

> *Monetary Restitution.* In cases where a final determination is favorable to a contractor employee, the department whose activity originally forwarded the case to the Director will reimburse the contractor employee in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance. Such amount shall not exceed the difference between the amount the contractor employee would have earned at the rate he was receiving on the date of suspension and the amount of his interim net earnings. No contractor employee shall be compensated for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under this regulation.

Department of Defense Directive 5220.6, 25 Fed. Reg. 7523, issued July 28, 1960:

> V. *Miscellaneous*
>
> * * * B. *Reconsideration of Prior Decisions* * * *
>
> 1. Decisions rendered under any industrial personnel review program prior to the effective date of this Regulation which denied or revoked an access authorization may be reconsidered by such boards as the Director deems appropriate at the request of the applicant, addressed through the Director, after a finding by the appropriate board that there is newly discovered evidence or that other good cause has been shown. When-

ever a final determination of denial or revocation based upon a personal appearance proceeding is found to have been unauthorized at the time it was made, authority is hereby delegated to the Director, Office of Industrial Personnel Access Authorization Review, to vacate such final determination and all subsequent administrative action predicated thereon and to take such other steps as may be deemed necessary to complete reconsideration of the case.

• • •

C. *Monetary Restitution*

If an applicant suffers a loss of earnings resulting directly from a suspension, revocation, or denial of his access authorization, and at a later time a final administrative determination is made that the granting to him of an access authorization at least equivalent to that which was suspended, revoked or denied, would be clearly consistent with the national interest and it is determined by the board making a final favorable determination that the administrative determination which resulted in the loss of earnings was unjustified, reimbursement of such loss of earnings may be allowed in an amount which shall not exceed the difference between the amount the applicant would have earned at the rate he was receiving on the date of suspension, revocation, or denial of his access authorization and the amount of his interim net earnings. The filing and processing of any such claim shall be in accordance with such regulations as the Secretary of Defense may prescribe after consultation with the Administrators. Payment shall be limited to claims administratively determined to be just and equitable. No applicant shall be compensated for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under any industrial personnel review program. Payments under this provision shall

be in full satisfaction of any and all claims, of whatever nature they may be, which the applicant has or may assert against the United States, or the Department of Defense or any of its agencies or activities, or the Federal Aviation Agency, or the National Aeronautics and Space Administration, or any of them, by reason of or arising out of the suspension, revocation or denial of access authorization.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 887

WILLIAM L. GREENE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the Court of Claims (Pet. App. A) was entered without opinion.

JURISDICTION

On December 20, 1962, the Court of Claims denied petitioner's request for review of the Commissioner's order of December 5, 1962. The petition for a writ of certiorari was filed on March 1, 1963. The jurisdiction of the Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims erred in suspending proceedings in a suit for a money judgment arising out of an adverse determination relating to security clearance, pending pursuit by petitioner of his administrative remedies before the Department of Defense.

REGULATIONS INVOLVED

The pertinent parts of regulations of the Department of Defense are set forth in the Appendix, *infra*, pp 11-16.

STATEMENT

The facts comprising the background of this litigation are fully set forth in this Court's opinion in *Greene* v. *McElroy*, 360 U.S. 474, 476-491.

In 1951 petitioner was vice-president and general manager of Engineering and Research Corporation (ERCO). On December 11, 1951, he was informed by the Army-Navy-Air Force Personnel Security Board (PSB) that his access to classified information was being preliminarily revoked pending a hearing before the Industrial Employment Review Board (IERB). Petitioner appeared at the hearing on January 23, 1952, and on January 29, 1952 the IERB reversed the action of the PSB and informed petitioner and his employer that he was authorized to work on secret contract work.

On April 17, 1953, the Secretary of the Navy notified petitioner that he had concluded that petitioner's continued access to classified Navy informa-

tion was inconsistent with the best interest of national security, and requested ERCO to bar petitioner from all classified projects and information.[1] Petitioner was thereafter discharged by ERCO. Following petitioner's request for reconsideration, the Navy informed him that it had requested the Eastern Industrial Personnel Security Board (EIPSB) to accept jurisdiction and to make a final determination concerning petitioner's status. On April 28, 1954, a hearing was held, and the EIPSB reached the same conclusion as had the Secretary. On September 15, 1955, petitioner requested review by the Industrial Personnel Security Review Board, and on March 12, 1956, he received a letter from the Director of the Office of Industrial Personnel Security Review affirming the determination of the EIPSB.

Petitioner then brought an action in the United States District Court for the District of Columbia seeking a declaration that the revocation of his clearance was unlawful and appropriate injunctive relief. On June 29, 1959, this Court held that, "in the absence of explicit authorization from either the President or Congress", petitioner could not be finally deprived of his security clearance "in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." *Greene* v. *McElroy*, 360 U.S. 474, 508. On remand, the district court entered a consent order which (1) declared the final revocation of petitioner's security clearance to

[1] At the time the Secretary acted, the PSB and IERB had been abolished. See *Greene* v. *McElroy*, 360 U.S. 474, 480-483.

be unauthorized; and (2) directed the expunging of all rulings, orders or determinations wherein or whereby the clearance was revoked (R. 4).

Thereafter, on December 28, 1959, petitioner made a demand on the General Counsel of the Department of the Navy for monetary restitution under paragraph 26 of the former (1955) Industrial Personnel Security Review Regulation, 20 Fed. Reg. 1553. *Infra*, p. 11 (R. 4). The General Counsel acknowledged receipt of this demand on January 11, 1960, (R. 4), and on April 20, 1960, petitioner supplied the General Counsel with additional information and claimed a loss of earnings of $49,960.41, from the date of dismissal to December 31, 1959 (R, 4-5).

Petitioner was then advised that the General Counsel had forwarded his claim to the Director of the Office of Security Policy of the Department of Defense for final determination. On January 4, 1961, petitioner renewed his claim in a letter to the Director (R. 5). On February 8, 1961, the Director wrote petitioner that he might submit additional material in writing, and that the Department of Defense was prepared to consider his case under the present Industrial Personnel Access Authorization Review Regulation, DOD Directive 5220.6, dated July 28, 1960. *Infra*, p. 11 (R. 5). This regulation was promulgated after this Court's decision in *Greene* v. *McElroy* pursuant to the express authority conferred upon the Secretary of Defense by the President in Executive Order 10865, 25 Fed. Reg. 1583, February 20, 1960.

On March 2, 1961 petitioner wrote to the Director, claiming restitution under paragraph 26 of the 1955 regulation, and declining to proceed under the 1960 regulation (R. 5-6). On March 16, 1961, the Director again expressed the willingness of the Department of defense to process petitioner's case under the 1960 regulation (R. 6).

On April 4, 1961, petitioner inquired of the Director whether the latter had authority to reconsider the case under the 1960 regulation without a request by petitioner (R. 6). The Director replied on May 15, 1961, reiterating that the Department was prepared to process the case at petitioner's request (R. 6). On June 1, 1961, the Deputy General Counsel of the Department of the Navy advised petitioner that he did not qualify for restitution under paragraph 26 of the former (1955) regulation, and again noted the offer of the Department of Defense to take prompt action on any request by petitioner to process his case under the 1960 regulation (R. 6-7).

Petitioner commenced this action in the Court of Claims on May 7, 1962, claiming money damages based on the Fifth Amendment and Paragraph 26 of the 1955 regulation (R. 1). The government filed a motion to suspend proceedings on July 5, 1962 (R. 9), which motion was denied on September 5, 1962 (R. 14). On December 5, 1962, before the extended time for filing an answer had elapsed, the Commissioner of the Court of Claims entered an order suspending proceedings pending petitioner's pursuit of his administrative remedies in the Department of Defense (R. 30).

Petitioner then requested review by the Court of Claims of the Commissioner's Order (R. 31). On December 20, 1962, the Court of Claims denied petitioner's request for review (R. 31).

ARGUMENT

1. The order which petitioner seeks to have reviewed by this Court directed only that proceedings be suspended while petitioner pursued his administrative remedies to completion in the Department of Defense. No final order has been entered on any issue, and the Court of Claims has yet to adjudicate petitioner's entitlement to the monetary relief which he seeks. There are no compelling reasons why this Court should take the case from the Court of Claims at an interlocutory stage. No legal rights will be prejudiced by allowing the case to proceed to judgment in ordinary course following petitioner's exhaustion of the administrative process.

The petition erroneously asserts that the order of the Court of Claims is inconsistent with this Court's decision in *Greene* v. *McElroy*, 360 U.S. 474. The suggestion is that this decision established petitioner's right both to access authorization for classified information and to money damages for the period during which his security clearance had been under a final revocation. But this Court was not called upon to consider, and did not in fact pass upon, petitioner's qualifications for access authorization or his right, if any, to monetary restitution. All that the Court decided was that there was a procedural

infirmity in the hearing which preceded the final revocation of the security clearance.

Under the regulation currently in effect, as well as that which was in force between 1955 and 1960, petitioner may obtain monetary restitution without resort to judicial proceedings if it is administratively determined that he is entitled to access authorization. See pp. 11, 15, *infra*. Under the present regulation, which was expressly authorized by the President (see p. 4, *supra*), the determination is made following a proceeding at which, with limited exceptions, the applicant has the right to confront and cross-examine adverse witnesses, on controverted issues.

As previously noted, petitioner has thus far declined to pursue this remedy. Since the outcome of the administrative proceedings might prove favorable to him, the court below was clearly correct in declining to entertain his claim at this juncture. Indeed, the court would have been justified in dismissing the action for failure to exhaust administrative remedies, instead of retaining jurisdiction pending petitioner's pursuit of those remedies. Cf. *Beard* v. *Stahr*, 370 U.S. 41.[2]

---

[2] *Taylor* v. *McElroy*, 360 U.S. 709, does not support petitioner here. Taylor had received a favorable determination of access authorization from the Department of Defense prior to oral argument before this Court. Hence the question on which certiorari was granted—the propriety of the procedures used in a prior revocation of access authorization—was no longer in issue, and this Court directed the dismissal of the action on the ground of mootness. The instant petitioner can hardly find comfort in *Taylor* when he refuses to seek relief under the regulations available to him.

Petitioner seeks to avoid the force of the holding that he should secure an administrative determination by pointing out that he has new employment and no longer wishes access to classified information. However, the administrative regulations have a dual purpose. One is the determination of access authorization; the other, restitution to persons who were improperly denied authorization. Petitioner has been advised that the Department of Defense will consider whether he would be entitled to an access authorization in order to determine whether he comes within the restitution provisions of the regulation. He can hardly suggest that the regulation should be more rigidly or restrictively interpreted.

2. Petitioner urges that he has a cause of action independent of the scheme for administrative restitution, *i.e.*, a Fifth Amendment right to just compensation for the taking of property. Assuming for the moment (but without conceding) that such a claim of right might be a tenable one, it hardly follows that the Court of Claims had no discretion to hold the complaint before it in abeyance in order to ascertain whether compensation under the administrative regulation will be forthcoming. Certainly, the grant of compensation under the regulation would moot the constitutional claim.

The reasons for abstention pending the conclusion of the administrative process are all the more compelling when one considers the novelty and difficulty of petitioner's theory. Certainly, in conventional legal terms there has been no taking of property by the United States. The government, in the interest

of national security, adopted regulations restricting the class of persons to whom its defense secrets would be made known. Persons denied access to classified government information may, to be sure, suffer consequential injury as a result of the program; their employers may decide to replace them. But consequential damage resulting from the administration of government regulations has not hitherto been thought to constitute a taking of property under the Fifth Amendment. Cf. *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155 (War Production Board's prohibition of gold mining not a taking). On the face of it, it would appear that the government, in the instant case, has appropriated nothing to itself. This is not to deny that the government had an obligation to correct the defect which this Court found in its prior administrative proceeding. That, of course, is precisely what it is prepared to do under the administrative regulation.

The novel issues which petitioner seeks to raise are not ripe for decision. They may never be presented by this litigation. We touch upon them only to emphasize that it was entirely appropriate for the Court of Claims to pretermit them.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Acting Assistant Attorney General.

ALAN S. ROSENTHAL,
DAVID C. KATZ,
Attorneys.

APRIL 1963.

APPENDIX

1. Department of Defense Directive 5220.6, issued February 2, 1955, 20 Fed. Reg. 1553, provides, in pertinent part, as follows:

> § 67.5-4 *Monetary restitution.* In cases where a final determination is favorable to a contractor employee, the department whose activity originally forwarded the case to the Director will reimburse the contractor employee in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance. Such amount shall not exceed the difference between the amount the contractor employee would have earned at the rate he was receiving on the date of suspension and the amount of his interim net earnings. No contractor employee shall be compensated for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under this regulation.

2. Department of Defense Directive 5220.6, issued July 28, 1960, 25 Fed. Reg. 7523, 32 C.F.R. 155, *et seq.*, provides in pertinent part, as follows:

> § 67.4-5 Procedures for personal appearance proceedings.
>
> (b) *Introduction of information.*
>
> * * * *
>
> (2) Unless permitted by subparagraphs (5) and (6) of this paragraph, the record may contain no information adverse to the applicant on any controverted issue unless (i) the information or its substance has been made available to the applicant and he offers no objection

to its presentation; or (ii) the information or its substance is made available to him and the applicant is afforded an opportunity to cross-examine the person providing the information either orally or by written interrogatories. The foregoing shall not apply to information bearing upon the characterization in the Statement of Reasons of any organization or individual other than the applicant. Information the admission of which is not prohibited by this subparagraph (2), or by any other provision of this Part 67, may be received and made part of the record and may be considered by any board or official charged with making determinations under this Part 67.

* * * *

(5) Records compiled in the regular course of business, or other physical evidence other than investigative reports as such, relating to a controverted issue, which, because they are classified, may not be inspected by the applicant, may be received and considered provided that (i) the Secretary of Defense or when appropriate, the Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration, or the Director, Office of Industrial Personnel Access Authorization Review, who has been designated as their special designee for that purpose pursuant to section 5b, Executive Order 10865, has made a preliminary determination that said physical evidence appears to be material, and that failure to receive and consider it would, in view of the level of access sought, be substantially harmful to the national security, and (ii) to the extent that the national secur-

ity permits, a summary or description of said physical evidence shall be made available to the applicant. In every such case, information as to the authenticity and accuracy of such physical evidence furnished by the investigative agency involved shall be considered.

(6) A written or oral statement by a person adverse to the applicant on a controverted issue, and not relating to the characterization in the Statement of Reasons of any organization or individual other than the applicant, may be received and considered without affording an opportunity to cross-examine the person making the statement only in circumstances described in either of the following subdivisions (i) and (ii), provided however that a summary of the statement as comprehensive and detailed as the national security permits shall be made available to the applicant:

(i) The head of the department supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his identity would be substantially harmful to the national interest.

(ii) The Secretary of Defense or when appropriate, the Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration, or the Director, Office of Industrial Personnel Access Authorization Review, who has been designated as their special designee for that particular purpose pursuant to paragraph 4a(2) of Executive Order 10865, has preliminarily determined, after considering information furnished by the investi-

gative agency involved as to the reliability of the person and the accuracy of the statement concerned, that the statement concerned appears to be reliable and material, and has determined that failure to receive and consider such statement would, in view of the level of access sought, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify (a) due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant, or (b) due to some other cause determined by the Secretary or the Deputy Secretary of Defense, or when appropriate, by the Administrator or Deputy Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration to be good and sufficient.

* * * *

§ 67.5-2 Reconsideration of prior decisions.

(a) Decisions rendered under any industrial personnel review program prior to the effective date of this Part 67 which denied or revoked an access authorization may be reconsidered by such boards as the Director deems appropriate at the request of the applicant, addressed through the Director, after a finding by the appropriate board that there is newly discovered evidence or that other good cause has been shown. Whenever a final determination of denial or revocation based upon a personal appearance proceeding is found to have been unauthorized at the time it was made, authority is hereby delegated to the Director, Office of Industrial Personnel Access Authorization Review, to vacate

such final determination and all subsequent administrative action predicated thereon and to take such other steps as may be deemed necessary to complete reconsideration of the case.

* * * *

§ 67.5-3 Monetary restitution.

If an applicant suffers a loss of earnings resulting directly from a suspension, revocation, or denial of his access authorization, and at a later time a final administrative determination is made that the granting to him of an access authorization at least equivalent to that which was suspended, revoked or denied, would be clearly consistent with the national interest and it is determined by the board making a final favorable determination that the administrative determination which resulted in the loss of earnings was unjustified, reimbursement of such loss of earnings may be allowed in an amount which shall not exceed the difference between the amount the applicant would have earned at the rate he was receiving on the date of suspension, revocation, or denial of his access authorization and the amount of his interim net earnings. The filing and processing of any such claim shall be in accordance with such regulations as the Secretary of Defense may prescribe after consultation with the Administrators. As used herein, earnings shall not include profits. Payment shall be limited to claims administratively determined to be just and equitable. No applicant shall be compensated for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under any industrial personnel review pro-

gram. Payments under this provision shall be in full satisfaction of any and all claims, of whatever nature they may be, which the applicant has or may assert against the United States, or the Department of Defense or any of its agencies or activities, or the Federal Aviation Agency, or the National Aeronautics and Space Administration, or any of them, by reason of or arising out of the suspension, revocation or denial of access authorization.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 25

WILLIAM L. GROSSO, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

STEPHEN L. KRESNER AND NEVERA H. SPECTOR,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petitions for Writs of Certiorari to the United States Court of Claims

PETITIONERS' REPLY MEMORANDUM

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Attorneys for Petitioner William L. Grosso

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Attorneys for Petitioners Stephen L. Kresner and Nevera H. Spector

April 9, 1968.

BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

Nos. 887 and 888

WILLIAM L. GREENE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

STEPHEN L. KREZNAR AND NOVERA H. SPECTOR, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petitions for Writs of Certiorari to the United States Court of Claims

PETITIONERS' REPLY MEMORANDUM

The United States, in its opposing brief in No. 887, rewrites the holding of this Court in *Greene* v. *McElroy*, 360 U.S. 474. This is evident from the following:

This Court's holding, 360 U.S. at 508:	The Government's revision, Brief in Opp., p. 3:
"We decide only that in the absence of explicit authorization from either the President or Congress *the respondents were not empowered to deprive petitioner of his job* in a proceeding in which he was not accorded the safeguards of confrontation and cross-examination." [Emphasis added.]	"On June 29, 1959, this Court held that, 'in the absence of explicit authorization from either the President or Congress', *petitioner could not be finally deprived of his security clearance* in a proceeding in which he was not accorded the safeguards of confrontation and cross-examination. *Greene* v. *McElroy*, 360 U.S. 474, 508." [Emphasis added.]

This transparent revision reflects the Government's consistent reluctance to accept this Court's premise in *Greene*, 360 U.S. at 492, that "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." The entire focus of the *Greene* decision was on the deprivation of this right to a job by virtue of an unauthorized procedure lacking the safeguards of confrontation and cross-examination.

The Government's attempt by truncated quotation to shift the Court's holding away from employment rights and over to security clearance bares the flaw in its opposition to the instant back pay claims. If *Greene* could be rewritten so as to decide merely what the Government now says it means (Brief in Opp. pp. 6-7)—i.e., that "All that the Court decided was that there was a procedural infirmity in the hearing which preceded the final revocation of the security clearance" —then the Government perhaps could claim that it need do nothing more than provide a new procedure free of such defects for purposes of determining access authorization.

But the Court in *Greene* rejected the Government's argument that the right to access clearance was the sole issue. Without passing on his right to access authorization*, the Court held that petitioner Greene had been illegally deprived of his job. Thus petitioners,

* The Brief in Opposition (p. 6) claims that petitioner Greene suggests that the *Greene* decision "established petitioner's right both to access authorization and to money damages . . ." What petitioner actually said (petition, p. 18) is something quite different: "The fact that the Court in *Greene* did not determine that Greene was entitled to access, of course, is not relevant to his right to restitution for illegal loss of his job."

having been deprived of property by "unreasonable governmental interference", 360 U.S. at 492, necessarily are entitled to be made whole for the resulting damages. Merely providing presidential authorization or curing procedural defects does not erase the past deprivations of property rights or eliminate the obligation to make restitution for the losses suffered.

The importance and substantiality of the questions presented have not been denied. The only claim is that they are premature. But review here cannot be premature where the alleged necessity of following further administrative proceedings, having no relevance to the right of restitution, in and of itself raises significant issues justifying the grant of certiorari. *Levers* v. *Anderson*, 326 U.S. 219, 220-221.

In light of the inability of the Government to face the issues presented in the petition without grossly distorting the *Greene* decision, the need for plenary review of the action below is indisputable; indeed, petitioners suggest that summary reversal is now in order.

Respectfully submitted,

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CARL W. BERUEFFY
Attorneys for Petitioner
William L. Greene

SIDNEY DICKSTEIN
DAVID I. SHAPIRO
GEORGE KAUFMANN
Attorneys for Petitioners
Stephen L. Kreznar and
Novera H. Spector

April 9, 1963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 84

WILLIAM L. GREENE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE PETITIONER

EUGENE GRESSMAN
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September 3, 1963.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 84

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v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE PETITIONER

THE ORDER BELOW

The Court of Claims filed no opinion. Its unreported order of December 20, 1962, denying review of Commissioner Day's order of December 5, 1962, appears in the printed record, together with Commissioner Day's order, at R. 9.

JURISDICTION

The order of the Court of Claims (R. 9), signed by Acting Chief Judge Laramore on December 20, 1962, denied petitioner's request for a review of Commissioner Day's order of December 5, 1962 (R. 9), suspending further proceedings "pending pursuit of administrative remedies by the Department of Defense." Under Rule 37(d)(4) of the Court of Claims Rules, the order of the Commissioner became the order of the Court by virtue of such denial of review.

The petition for a writ of certiorari was filed on March 1, 1963, and was granted on April 22, 1963. 372 U.S. 974. The jurisdiction of this Court rests on 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Does this Court's decision in *Greene* v. *McElroy*, 360 U.S. 474, contemplate and direct that one deprived of a job by Defense Department officials, whose actions were found by this Court to be unauthorized, shall receive monetary restitution for back pay losses in accordance with applicable regulations (Par. 26, Dept. of Defense Directive 5220.6, 20 Fed. Reg. 1553, February 2, 1955) or the Fifth Amendment to the Constitution of the United States?

2. Was it proper for the Court of Claims to suspend, without reaching the merits, a suit for monetary restitution under the aforesaid 1955 regulation and the Fifth Amendment and to remit the plaintiff to further proceedings before the Department of Defense under DOD Directive 5220.6, 25 Fed. Reg. 7523, issued July 28, 1960?

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

This case involves the Fifth Amendment of the United States Constitution; and Department of Defense Directive 5220.6, 20 Fed. Reg. 1553, issued February 2, 1955; and Department of Defense Directive 5220.6, 25 Fed. Reg. 7523, issued July 28, 1960. These are reprinted in pertinent part in the appendix hereto, *infra*.

STATEMENT OF THE CASE

A. Introduction

Prior to April 23, 1953, petitioner William L. Greene was vice-president and general manager of Engineering and Research Corporation (ERCO). On that date he was discharged by ERCO due to revocation of his security clearance by the Department of the Navy. In *Greene* v. *McElroy*, 360 U.S. 474, this Court held that the action of the Department was not validly authorized and that the officials of the Defense Department "were not empowered to deprive petitioner of his job" as they had done; thereafter, the District Court ordered that "any or all rulings, orders, or determinations wherein or whereby plaintiff's security clearance was revoked are hereby annulled and expunged" from all Government records. (R. 3).[1]

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[1] A photocopy of the District Court's order, signed by Judge Keech, appears in Hearings Before the Committee on Un-American Activities, House of Representatives, relating to H.R. 10175, etc. (87th Cong., 2d Sess., 1962), p. 490. The full text of that order reads as follows:

ORDER

Upon the decision of the United States Supreme Court in this case (*Greene* v. *McElroy*, 360 U.S. 474) and the copy of

Petitioner then made formal demand on the Government for monetary restitution for loss of earnings pursuant to the applicable regulation, Section 26 of the Industrial Personnel Security Review Regulation DOD 5220.6, 20 Fed. Reg. 1553 (1955). Restitution was denied. Petitioner accordingly brought this suit in the Court of Claims for loss of earnings, basing his claim on the aforesaid regulation and the Constitution of the United States. (R. 6-7). The Court of Claims, without expressing any view on the merits, entered an order (R. 9) suspending all proceedings before it pending Greene's institution of proceedings before the Department of Defense under a 1960 Regulation adopted following the decision in *Greene* v. *McElroy*. This procedure would require a hearing to determine whether petitioner is *presently* entitled to access clearance, a clearance which petitioner does not need

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the judgment and opinion of the Supreme Court heretofore filed with the clerk of this Court; and

It appearing that counsel for the respective parties have consented hereto, it is hereby

ORDERED that the action of the Secretary of Defense and his subordinates in finally revoking plaintiff's security clearance was and the same is hereby declared to be not validly authorized; and it is further

ORDERED that any or all rulings, orders, or determinations wherein or whereby plaintiff's security clearance was revoked are hereby annulled and expunged from all records of the Government of the United States.

Dated: 12/14, 1959

/s/ R. B. KEECH
United States District Judge

Consented to:

/s/ DONALD B. MACGUINEAS
Attorney for Defendants

/s/ EUGENE GRESSMAN
Attorney for Plaintiff

or want, and, in the event of a favorable determination, empowers the Secretary of Defense *in his discretion* to award restitution. On the other hand, an unfavorable determination as to petitioner's present access clearance would, under the Government's theory, lead to a denial of any and all restitution.

Petitioner seeks review of that order, and a judgment of this Court that his claim is valid, or alternatively, a direction to the Court of Claims to adjudicate the merits of his claim without requiring prior resort to the procedure under the 1960 Regulation.

B. The Facts On Which Petitioner's Claim Is Based

The facts on which petitioner bases his claim may be sketched briefly here, for they are fully narrated in this Court's opinion in *Greene* v. *McElroy*, 360 U.S. 474 at 476-491.

(1) Greene, an aeronautical engineer, began work for ERCO in 1937 and, except for a brief leave of absence, remained with the firm until his discharge in 1953, having risen to be one of its chief executives because of the "excellence of his work", 360 U.S. at 476. ERCO, a firm devoted primarily to developing and manufacturing mechanical and electrical parts, performed classified work for various armed services. In connection with this work, Greene had thrice obtained security clearances, two of them for Top Secret.[2]

[2] On August 9, 1949, petitioner had been given a confidential clearance by the Army. On November 9, 1949, petitioner had been given a top secret clearance by the Assistant Chief of Staff G-2, Military District of Washington. On February 3, 1950, petitioner had been given a top secret clearance by the Air Material Command. All of these clearances were pursuant to industrial security requirements contractually imposed upon ERCO employees.

(2) On December 11, 1951, petitioner was informed by the Army-Navy-Air Force Personnel Security Board (PSB) that "access by you to contract work and information [at ERCO] . . . would be inimical to the best interests of the United States" and that his clearances were being revoked. He was also advised that he could seek a hearing before the Industrial Employment Review Board (IERB), and petitioner took that course of action. Petitioner, with counsel, appeared at hearings before the IERB with respect to certain allegations made about his past associations. The Government presented no witnesses at these hearings and petitioner had no opportunity to confront or question persons who had allegedly made statements adverse to him. On January 29, 1952, on the basis of these hearings and of the confidential reports, the IERB reversed the action of the PSB and informed petitioner and ERCO that petitioner was authorized to work on secret contract work.

(3) On April 17, 1953, following the abolition of the PSB and the IERB, the Secretary of the Navy wrote ERCO that, on a review of the case, he had concluded that petitioner's "continued access to Navy classified security information [was] inconsistent with the best interests of National Security." No hearing preceded this notification. The Secretary further requested ERCO to exclude petitioner "from any part of your plants, factories or sites at which classified Navy projects are being carried out [and] to bar him access to all Navy classified information." ERCO had no choice but to comply with this request and petitioner was in fact discharged by ERCO on April 23, 1953. On October 13, 1953, petitioner was advised that the Navy had requested the Eastern Industrial Personnel Secur-

ity Board (EIPSB) to make a final determination concerning petitioner's status. A hearing before the EIPSB took place on April 28, 1954, again without any confrontation by petitioner of adverse witnesses, if any. Thereafter the EIPSB affirmed the action of the Secretary of the Navy and ruled that granting clearance to petitioner for access to classified information was "not clearly consistent with the interest of national security." On September 16, 1955, petitioner requested review by the Industrial Personnel Security Review Board. On March 12, 1956, petitioner received a letter from the Director of the Office of Industrial Personnel Security affirming the determination of the EIPSB.

(4) In 1954, following the EIPSB determination, petitioner filed a complaint in the United States District Court for the District of Columbia asking for a declaration that the action of the Department of Defense officials in advising ERCO that petitioner could not be employed was illegal and void, for an order restraining Department of Defense officials from acting pursuant to such illegal advice or notification to ERCO, and for an order requiring such officials to advise ERCO that the Secretary of Navy's letter of April 17, 1953, was void. The District Court granted the Government's motion for summary judgment, 150 F. Supp. 958, and the Court of Appeals affirmed, 254 F. 2d 944 (App. D.C.).

(5) Petitioner obtained review of the Court of Appeals judgment in this Court. On June 29, 1959, this Court held that "in the absence of explicit authorization from either the President or Congress [the Secretaries of the armed forces] were not empowered to deprive petitioner of his job in a proceeding in which

he was not afforded the safeguards of confrontation and cross-examination." *Greene* v. *McElroy*, 360 U.S. 474 at 508.

On December 14, 1959, pursuant to the decision and judgment of this Court the District Court ordered "that the action of the Secretary of Defense and his subordinates in finally revoking plaintiff's security clearance was and the same is hereby declared to be not validly authorized" and "that any or all rulings, orders, or determinations wherein or whereby plaintiff's security clearance was revoked are hereby annulled and expunged from all records of the Government of the United States." (R. 3).[3] Thereby expunged were the adverse determinations of the PSB (Dec. 11, 1951), the Secretary of the Navy (April 17, 1953), the EIPSB (May 30, 1954), and the Director of the Office of Industrial Personnel Security (March 12, 1956). Left on the record and in effect were the three security clearances obtained prior to Dec. 11, 1951, and the IREB order of Jan. 29, 1952, authorizing petitioner to work on secret contract work.

C. Petitioner's Attempts to Obtain Restitution From the Defense Department

(1) On December 28, 1959, petitioner made a formal demand on the General Counsel of the Department of the Navy "for monetary restitution from the Department of the Navy and/or the Department of Defense pursuant to Section 26 of the Industrial Personnel Security Review Regulation, 20 Fed. Reg. 1553." (R. 4).

(2) On January 11, 1960, the General Counsel of the Department of the Navy acknowledged the demand

[3] For full text of the District Court order, see footnote 1, *supra*.

and requested that certain dates and financial data be supplied, stating that if such information were supplied the claim would receive "such consideration as it deserves." A statement of Greene's legal position respecting the applicability of Section 26 was also requested. (R. 4).

(3) On April 20, 1960, petitioner supplied the General Counsel of the Department of the Navy with the requested information and statement of legal position. He stated under oath that he had incurred a $49,960.41 loss of earnings from April 23, 1953, the date of his dismissal, up to December 31, 1959. (R. 4).

(4) On January 4, 1961, having been advised that his claim had been forwarded to the Director of the Office of Security Policy of the Department of Defense for final determination, petitioner renewed his claim in a letter addressed to the said Director. Petitioner, understanding that the Director was disposed to deny the claim, also requested an opportunity to know and rebut the legal representations made in support of any disposition to deny the claim. (R. 4).

(5) On February 8, 1961, the said Director responded that Greene might submit in writing any additional material as to his legal position by March 3, 1961. The Director also stated that "this Department is prepared, at his [Greene's] request, to consider his case under the above-mentioned 1960 Review Regulation [Industrial Personnel Access Authorization Review Regulation, DOD Directive 5220.6, dated July 28, 1960] and to take such action as may be necessary to reach a final determination as to whether it is in the national interest to grant him an authorization for access to classified information." (R. 4).

(6) On March 2, 1961, Greene wrote to the said director restating his legal position as to the applicability of Section 26 and declining to request a reconsideration of his case under the 1960 regulation. He therein stated that he could not

> . . . agree to any procedure which might result in a new, adverse determination which could then be used by the Department to bolster the argument that Section 26 does not apply to this case. And such a possible determination—whether made by the Screening Board or the Hearing Board—could arguably have a retroactive effect so as to give the semblance of legality to the clearance revocation dating back to 1953. Quite clearly the Supreme Court determination that this revocation was unlawful is not subject to a subsequent administrative determination that the revocation was lawful. That is particularly true where the purported effect of the latter determination might retroactively destroy a claim for loss in earnings. (R. 5).

(7) On March 16, 1961, the said Director responded by re-emphasizing the Department's "willingness to process the question of Mr. Greene's current eligibility for access authorization under the provisions of the 1960 Review Regulation." (R. 5).

(8) On April 4, 1961, Greene inquired of said Director as to whether, pursuant to Paragraph V.B. 1 of DOD Directive 5220.6, dated July 28, 1960, the Director had authority to reopen the case on his own motion and take such steps as might be deemed necessary to complete reconsideration without a formal request from Greene. (R. 5).

(9) On May 15, 1961, the said Director replied that "As has been indicated previously, this Department

is prepared at Mr. Greene's request to undertake the processing of his case under the July 28, 1960 Review Regulation." (R. 5).

(10) Finally, on June 1, 1961, the Deputy General Counsel of the Department of Navy advised plaintiff that "In accordance with Department of Defense policy, it has been determined by the Department of Defense that Mr. Greene does not qualify for monetary restitution under the provisions of Paragraph 26 and that, therefore, his claim, being premature, cannot be given further consideration at this stage of the administrative proceedings." It was further stated that "the Department of Defense has informed you that it is prepared at Mr. Greene's request to undertake the processing of his case under the July 28, 1960 Review Regulation, and that if he does so request, prompt action will be taken thereon." (R. 5-6).

D. Proceedings in the Court of Claims

Petitioner filed this suit in the Court of Claims on May 7, 1962, alleging the facts stated above, and claiming that he was entitled to monetary restitution "in an amount equal to the salary or pay which he would have earned at the rate he was receiving on the date of his suspension from employment by ERCO less his earnings from other employment."[4] (R. 6). Petitioner based his claim on the Fifth Amendment and Par. 26 of the 1955 Directive. (R. 6-7).

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[4] During the period from April 23, 1953, to April 23, 1962, plaintiff had earnings from other employment in the amount of $[illegible],039.59. During the same period he would have had earnings from employment with ERCO, at the rate he was receiving on the date of his suspension, in the amount of $162,000.00. (R. 6).

The United States did not file an answer within the original allotted time.[5] Before the extended time for filing the answer had elapsed, Commissioner Day *sua sponte* entered an order (R. 9) on December 5, 1962, reading as follows:

> "In view of the action this day by the court in *Stephen L. Kreznar* v. *United States*, No. 47-60, and *Novera Herbert Spector* v. *The United States*, No. 48-60, further proceedings herein are hereby suspended pending pursuit of administrative remedies by the Department of Defense."[6]

The "administrative remedies" referred to, while as yet not pinpointed by the Government, presumably are those in Par. V.C. of the DOD Directive 5220.6, adopted in 1960 following the *Greene* decision. That paragraph states that reimbursement for loss of earnings "may be allowed" following a final administrative determination that access authorization is pres-

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[5] The Government had filed a motion to suspend proceedings on July 5, 1962. (R. 7). Petitioner filed objections thereto, and on September 5, 1962, Commissioner Day denied the motion (R. 8) and granted the Government 30 days to file its answer. The Government's failure to seek review of Commissioner Day's denial of the motion within five days made such action that of the Court of Claims under Rule 37(d)(4) of that court. The Government did not renew its motion. Commissioner Day's order of December 5, 1962, suspending proceedings was *sua sponte*. (R. 9).

[6] The action of the Court of Claims on "this day"—December 5, 1962—in *Kreznar* and *Spector* related to denials of leave to file further petitions for rehearing in light of the September 5 order of Commissioner Day in the instant case (which had become the order of the court, see footnote 5, *supra*) denying the Government's motion to suspend. The similar orders of the Court of Claims in *Kreznar* and *Spector*, suspending proceedings therein until further administrative remedies have been pursued, are the subject of the pending petition for writ of certiorari in No. 85, Oct. Term, 1963.

ently consistent with the national interest and where the prior adverse determination has been found "unjustified." In other words, the 1960 Directive said to be now available to petitioner places three conditions on monetary restitution: (1) a final administrative determination that access clearance is presently consistent with the national interest, (2) an administrative determination that the prior removal of clearance was unjustified, and (3) a favorable exercise of administrative discretion that reimbursement would be justified.

Pursuant to Rule 37 (d)(4) of the Court of Claims,[7] petitioner duly requested review of Commissioner Day's order. Petitioner claimed that the order was inconsistent with this Court's decision in *Greene* v. *McElroy*, 360 U.S. 474, that the doctrine of exhaustion of administrative remedies had no application under these circumstances, and that his right to monetary restitution was vested and immune from administrative disfeasance. (R. 9-14). Petitioner further stated that he "does not need or want any access authorization under the 1960 Directive." (R. 10).

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[7] Petitioner's request for review mistakenly referred to Rule 37(d)(5) of the Court of Claims, an earlier numbering of what is now Rule 37(d)(4). The Government agreed that this discrepancy was of no consequence. (R. 15, n. 1). Rule 37(d)(4) now reads in pertinent part:

> "Every [procedural] order of a Commissioner entered pursuant to subparagraphs (2) or (3) of this paragraph (d) shall become the order of the Court unless within 5 days after the action thereon a dissatisfied party files with the Court a request for review of the Commissioner's action . . . Requests for review may be acted upon by the Chief Judge or a Judge in chambers, or may be assigned for argument before the Court or a Judge designated for that purpose prior to action thereon."

On December 20, 1962, Acting Chief Judge Laramore on behalf of the Court of Claims denied the request for review, thereby under Rule 37 (d)(4) making Commissioner Day's order of suspension that of the Court of Claims.

SUMMARY OF ARGUMENT

This case is an aftermath of, and is controlled by, the decision in *Greene* v. *McElroy*, 360 U.S. 474. The critical and the only holding in that case was that "in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." 360 U.S. at 508.

Central to that holding was a recognition that the loss of a job and the deprivation of employment opportunities in a chosen profession, caused by the unauthorized actions of governmental officials, constituted an invasion of petitioner's "property" and "liberty" rights under the Fifth Amendment. The economic losses which petitioner thereby suffered were expressly recognized by the Court.

Since the injury to petitioner's constitutionally protected rights had been so clearly established, the *Greene* decision necessarily contemplated that petitioner would be entitled to what he is now seeking in the instant suit in the Court of Claims—an appropriate measure of monetary restitution for the losses suffered. As Mr. Justice Cardozo once put it, "Illegality established, liability ensues." *Schubert* v. *Schubert Wagon Co.*, 249 N.Y. 253, 256, 164 N.E. 42, 43. Or as this Court held in *United States* v. *Pewee Coal Co.*, 341

U.S. 114, 116-117, reimbursement follows "almost as a matter of course" from a finding of an invasion of a property right. Indeed, this Court in rendering the *Greene* decision was well aware of the just compensation requirements of the Fifth Amendment as well as of the monetary restitution provisions of Paragraph 26 of the 1955 Defense Department Directive. And it is fair to conclude that this Court contemplated that one or both of those means of reimbursement for losses would be available to petitioner.

Petitioner accordingly filed in the Court of Claims a suit for restitution of his established and recognized losses, relying both on the Fifth Amendment and Paragraph 26 of the 1955 Directive. The Court of Claims, however, suspended proceedings pending pursuit by petitioner of further administrative proceedings before the Department of Defense. The proceedings said to be available are those authorized by the 1960 Defense Department Directive, adopted after the petitioner's demand for restitution under Paragraph 26 of the 1955 Directive had been filed.

These new proceedings, however, are totally inadequate and unresponsive to petitioner's demand for restitution under the Fifth Amendment and under Paragraph 26. That demand relates to a vested right to recoupment for damages suffered in the past, a right which is in no way subject to administrative disfeasance at this stage. The proceedings under the 1960 Directive have no bearing upon either the Fifth Amendment claim or the Paragraph 26 claim. In fact, nothing that the Defense Department could now do or say would in any way resolve the issues pending before the Court of Claims. See *Southwestern Sugar Co.* v. *River Terminals Corp.*, 360 U.S. 411, 415.

The 1960 Directive seeks to require the claimant for monetary restitution to have a current access authorization, an authorization which this petitioner does not need or want. It also seeks to precondition the right to restitution upon an administrative reexamination of the prior adverse determinations which led to the employee's discharge. In this case, however, all such adverse determinations have been expunged from Government records by order of the District Court for the District of Columbia on the remand of the *Greene* case from this Court.

Under these circumstances, the doctrine of exhaustion of further administrative remedies is completely inapplicable. Indeed, the doctrine has been urged here only because of a refusal to recognize the critical holding of this Court in the *Greene* case. The Government has repeatedly claimed that this Court did nothing more than uncover a procedural flaw under the 1955 Directive and that the Court in effect remanded the security case to the Defense Department for processing under new, authorized procedures that are more in conformity with due process concepts. Essentially, the Government's position is one of seeking a retrial of petitioner's security charges under amended procedures. In no real sense is such a retrial related to the doctrine of exhaustion of administrative remedies. It only reflects a misunderstanding of the plain words and the contemplation of this Court in *Greene*.

Petitioner does not seek a new access clearance. Nor does he want to relitigate once again the hoary charges first leveled against him many years ago. This is a suit for restitution for losses already suffered. It should be tried by a court, not by a security board. The day of reckoning has already been too long delayed.

The doctrine of exhaustion of administrative remedies should not be abused so as to postpone that day indefinitely.

ARGUMENT

I. THIS COURT IN GREENE v. McELROY, 360 U.S. 474, HELD THAT PETITIONER HAD BEEN ILLEGALLY DEPRIVED OF HIS JOB AND THEREBY CONTEMPLATED THAT HE WOULD RECEIVE MONETARY RESTITUTION FOR BACK PAY LOSSES

The crux of this case lies in the decision of this Court rendered on June 29, 1959, in *Greene* v. *McElroy*, 360 U.S. 474. The long-standing and consistent refusal of the United States to accept the holding and the necessary implications of that decision has led to the current controversy; and that refusal has given birth to the mistaken concept, adopted by the Court of Claims, that petitioner must now exhaust further administrative procedures before achieving eligibility for monetary restitution. A reexamination and analysis of the prior *Greene* decision thus becomes necessary to expose the impropriety of the Government's position and the inapplicability of the exhaustion principle.

It is petitioner's basic position that the express holding in *Greene* is so plain as to admit of no conclusion other than that petitioner is now entitled to monetary restitution without the necessity of additional administrative concern with his past or present access status. To hold as this Court did, 360 U.S. at 508, that the agents of the United States "were not empowered to deprive petitioner of his job," is to resolve the basic consideration in petitioner's entitlement to monetary restitution. Legally, nothing more remains than to compute the dollar amount of that restitution in accordance with accepted procedures, giving due regard to any offsets that the Government may demonstrate.

A. The Issues Presented to This Court by Petitioner in the Prior Case Were Basically in Terms of An Unauthorized and Illegal Deprivation of Employment Rights.

The genesis of the holding in *Greene* v. *McElroy* is to be found in petitioner's original complaint filed in the District Court for the District of Columbia in 1954. The petitioner there sought declaratory relief to the effect that the actions of the governmental agents in advising petitioner's employer (ERCO) that petitioner could no longer be employed be declared illegal and void. See R. 8-9, *Greene* v. *McElroy,* No. 180, October Term, 1958.[8] This requested relief was premised upon the following critical paragraph in the complaint (Par. 18, R. 8):

> As a result of the said illegal arbitrary, unjust and void actions of the defendants as aforesaid, plaintiff has been deprived of his employment, and, as of the date of filing this complaint, has suffered loss of earnings amounting to more than $20,000.00, and will in future continue to suffer loss of earnings and other damages unless the defendants be restrained by orders of this Court and unless the acts of defendants herein complained of be declared by this Court to be illegal, arbitrary, and void. Said injury and damage is irreparable and the plaintiff is without adequate or any remedy at law.

Notable is the fact that no effort was made to obtain a judicial determination that petitioner was entitled to

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[8] As summarized by the Government in its brief before this Court, p. 4, petitioner's suit sought a judgment "(a) declaring the acts of the respondents 'in advising plaintiff's employer that plaintiff could not be employed, illegal, null, void and of no effect;' (b) restraining the respondents from 'doing any act in pursuance of the said illegal declaration that plaintiff is not entitled to be employed by' ERCO; and (c) requiring respondents to advise ERCO that the letter of April 17, 1953, is null and void."

access to classified information or that he was entitled to a security clearance.

In the course of the proceedings in the lower courts the Government denied that it had deprived petitioner of his right to work for ERCO.[9] It advanced the contention that petitioner really was seeking access to classified information, that he had no standing to assert a right to such information and that the denial to him of that right was both authorized and in accordance with due process of law. That essentially was the position adopted by the lower courts in denying petitioner the requested declaratory relief.

When the case came to this Court on certiorari, petitioner again repeated his basic contention that the necessary consequence of the illegal and unauthorized actions of the Defense Department officials was his discharge from employment with ERCO. The questions presented to this Court by petitioner in both his petition and his brief on the merits abounded with references to the alleged invalidity of causing his discharge and the ensuing deprivation of his liberty and property without due process of law. See Questions Presented, Brief for Petitioner, No. 180, October Term, 1958, pp. 2-3. These questions, moreover, were necessarily definable within the bounds of the requested relief, and that relief related solely to a declaration of the invalidity of causing his discharge from employment.

The argument advanced in petitioner's brief expanded, *inter alia*, the proposition that he had been de-

[9] Thus in its brief before the Court of Appeals for the District of Columbia, pp. 15-16, the Government urged that its officials "have not deprived appellant of his right to work for ERCO or any other employer."

prived illegally of his employment rights. It was said, for example, that "the right to contract with reference to one's employment, free of arbitrary interference on the part of governmental authority is one of the most important rights included within the protection of the due process clause." Brief, p. 21. And the deprivation of that right was said to be no less effective or complete when done under the guise of depriving petitioner access to classified information. "In this case, while the government officials have not, in so many words, said that Greene may not work as an aeronautical engineer, they have accomplished that result." Brief, pp. 23-24. "As a practical matter, in Greene's case the loss of employment was inevitable when the clearance was denied." Brief, p. 35, n. 10.

The brief submitted to this Court by the Solicitor General acknowledged (p. 30) "that the withdrawal of petitioner's security clearance operated, as a practical matter, to cause him to lose his position with ERCO, since his lack of access to classified information terminated his usefulness to the company." But the brief insisted that the only power asserted by the Government was its "refusal to disclose to him, a private person, secret military information in its custody and for the protection of which it was responsible." Brief, p. 30. The basic constitutional question was then defined in terms not of the right to employment but of the right to access to classified information. "In its primary form the issue is whether petitioner's interest in access to classified defense information amounts to 'liberty' or 'property' of which he cannot be deprived without due process of law." Brief, p. 29. And in denying that petitioner had any such recognizable interest, the Government sought to create the impression that petitioner's suit was in fact

"one seeking restoration of petitioner's security clearance." Brief, p. 60. The relief he sought, it was said, was "restoration to access to classified information." Brief, p. 22.

Thus were the battle lines drawn in the proceedings before this Court. Petitioner was seeking, as he had from the commencement of his suit, a judicial determination of the invalidity of, or lack of authority for, the governmental actions—including those orders and letters denying him access to classified information—which had led to the loss of his employment with ERCO. Underlying his entire effort was the economic injury which the loss of his job had entailed. And it was that injury, rather than any denial of access to classified information, which motivated his desire for judicial vindication of his right to employment free of unwarranted governmental interference.

The Government, on the other hand, refused to concede that such a vindication was really in issue. While agreeing that the practical impact of the denial of access was the loss of petitioner's job at ERCO, the Government sought to transfer the whole controversy away from employment rights over into the area of security clearances and access eligibility. On this premise, petitioner's loss of a job was merely an incidental consequence of the Government's power to determine who should see and work on classified documents. And petitioner's efforts to vindicate his employment rights were translated into an attempt to secure judicial authorization for access to secret information.

These governmental attempts to minimize petitioner's employment rights in favor of a concentration on the denial of access authorization provide the basic clue to all that has happened subsequent to this Court's

Greene decision. As we shall see, the Government has yet to concede that petitioner's efforts, or this Court's holding in *Greene,* deal with anything more basic than the procedures leading to the past denials of access authorization to petitioner.

B. The Critical and the Only Holding in the Greene Case Was "That in the Absence of Explicit Authorization from Either the President or Congress the Respondents Were Not Empowered to Deprive Petitioner of His Job in A Proceeding in Which He Was Not Afforded the Safeguards of Confrontation and Cross-Examination."

In rendering the decision in *Greene* v. *McElroy,* this Court carefully and narrowly defined the matter to be decided—i.e., "whether the Department of Defense has been authorized to create an industrial security clearance program under which affected persons *may lose their jobs and may be restrained in following their chosen professions* on the basis of fact determinations concerning their fitness for clearance made in proceedings in which they are denied the traditional procedural safeguards of confrontation and cross-examination." 360 U.S. at 493; emphasis added.

The majority of this Court made two essential predicates to the issue as thus narrowly defined:

(1) It recognized that, as the Government had conceded, the revocation of petitioner's security clearance had caused petitioner to lose his job at ERCO and had seriously affected, if not destroyed, his ability to obtain employment in the aeronautics field. And the Court further recognized that "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." 360 U.S. at 492.

(2) The Court deemed it unnecessary to resolve the contentions of the Government that (a) the admitted interferences with petitioner's liberty and property rights were indirect by-products of necessary governmental action designed to protect the integrity of secret information, and (b) petitioner had been accorded due process of law consonant with an effective security program. 360 U.S. at 492-493.

In other words, this Court defined the decisive issue in terms of the authorization of the Defense Department officials to deprive petitioner of his job at ERCO and of his ability to follow his chosen profession in the aeronautical field. Significantly, the issue was not cast as one relating only to the authorization for finally denying access to classified information. Nor did the authorization in question concern merely the grant or denial of a security clearance. Rather the Court gave full recognition to petitioner's basic complaint that he had been economically and professionally injured by the actions of the Defense Department officials in denying him access clearance. The authorization to be examined was the authorization to cause that real injury to petitioner's job and employment opportunities. This Court thus was concerned with the ultimate impact of the governmental action, not merely with the clearance procedures which led to that impact.

Being unable to find that either the President or Congress had authorized an industrial security program of this nature, this Court concluded and decided "only that in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safe-

guards of confrontation and cross-examination." 360 U.S. at 508.

Thereby rejected was any notion that the petitioner was seeking, or was entitled to, a ruling restoring his access authorization. As the special concurring opinion of Mr. Justice Harlan made explicit, "there is nothing in the Court's opinion which suggests that petitioner must be given access to classified material." 360 U.S. at 510.[10] The *Greene* decision is simply a determination that the procedures, the rulings and the denials of security clearance which led to the destruction of petitioner's job opportunities were without proper executive or legislative authorization. And to make that determination effective, the ensuing order of the District Court expunged from government records "any or all rulings, orders, or determinations wherein or whereby plaintiff's security clearance was revoked," after declaring that "the action of the Secretary of Defense and his subordinates in finally revoking plaintiff's security clearance was . . . not validly authorized." Thereby revoked and expunged were the various orders which were later described by this Court as having been "in the nature of adjudications affecting legal rights," and as having "a significant impact upon his employment." *Hannah* v. *Larche*, 363 U.S. 420, 451, 452.

The major factor now relevant that emerged from the *Greene* decision was the unconditional recognition that petitioner had in fact been injured with respect to his employment and his profession. And it is that recognition that becomes the controlling consideration in the present litigation.

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[10] Petitioner in fact has never been given access to classified information at any time subsequent to this Court's *Greene* decision. He has never sought such access authorization and does not need it in his present occupation.

C. Having Recognized Petitioner's Economic Injury, This Court in the Greene Case Necessarily Contemplated That He Would Be Entitled to An Appropriate Measure of Monetary Restitution.

The injury to, and the destruction of, petitioner's employment opportunities resulting from the Government's unauthorized actions were uppermost in this Court's ruling in the *Greene* case. Such injury and destruction were the central core around which the other aspects of the decision revolved. Once the illegality or lack of authorization of the governmental actions became established, the right to some form of restitution for the losses suffered became clear. As Mr. Justice Cardozo once put it, "Illegality established, liability ensues." *Schubert* v. *Schubert Wagon Co.*, 249 N.Y. 253, 256, 164 N.E. 42, 43. A wrong having been brought to light, "There can be no stopping after that until justice has been done." *Bemis Bros. Bag Co.* v. *United States*, 289 U.S. 28, 36.[11]

Petitioner's entitlement to some form of monetary restitution for injuries suffered was not, of course, directly involved in the prior *Greene* decision. That case concerned only the primary illegality of the actions causing the injuries; monetary damages were necessarily left to another day and another forum. But it is unrealistic to assume that this Court, having noted the injuries and the illegal causation, did not contemplate that petitioner would be eligible for restitution for past losses. Such an assumption would be contrary to the general policy of the law, noted above, that recognizes liability for an established illegality.

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[11] "There will be only partial attainment of the ends of public justice unless retribution for the past is added to prevention for the future." Mr. Justice Cardozo, dissenting in *Jones* v. *S.E.C.*, 298 U.S. 1, 30.

Indeed, the considerations that were actually before this Court at the time of the *Greene* decision included the availability of monetary relief for the losses suffered by petitioner. In the companion case, *Taylor* v. *McElroy*, 360 U.S. 709, argued immediately prior to *Greene*, the Government urged that the matter was moot because, after certiorari had been granted, the Secretary of Defense had determined that Taylor was eligible for access clearance and had expunged all adverse determinations. The Solicitor General stated orally, in response to a question from the Bench, that Taylor was "eligible under applicable regulations for compensation for wages lost during the time he was unemployed due to the clearance revocation and denial." 360 U.S. at 711. This representation, which was accepted by the Court in agreeing that the case was moot, was necessarily based on Paragraph 26 of the 1955 Defense Department Directive,[12] one of the bases for Greene's claim in the instant proceeding. Greene and Taylor had sought the same relief in their District Court complaints and the mootness issue turned on whether the Government had afforded Taylor sufficiently complete relief that he would not be disadvantaged by failure to get an appropriate order from the District Court. Neither the Solicitor General nor Assistant Attorney General Doub (who argued the *Greene* case) gave any hint that in the event of a judgment favorable to him, on the issues raised, Greene

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[12] Paragraph 26 provides in pertinent part as follows:

"In cases where a final determination is favorable to a contractor employee, the department whose activity originally forwarded the case to the Director will reimburse the contractor employee in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance."

would not be eligible for compensation under the same Paragraph 26.[13]

Further explicit evidence that the Court intended or understood that its decision would result in monetary reimbursement to Greene is the dissenting opinion of Mr. Justice Clark, who objected that the *Greene* decision "subjects the Government to multitudinous actions—and perhaps large damages—by reason of discharges made pursuant to the present procedures", 360 U.S. 474, 510 at 523-24.[14] Neither the majority opinion nor the concurrence of Mr. Justice Harlan contradicted Mr. Justice Clark's assertion regarding the Government's potential liability.

If the Court had not intended this result it is highly likely that it would have said so, since the reimbursement program of Paragraph 26 was discussed in the Court's opinion (360 U.S. at 504-505) in connection with the Government's contention that Congress had ratified the program. The Government had relied on Hearings Before the House Committee on Appropriations on Department of Defense Appropriations for 1958, 84th Cong., 1st Session, pp. 774-781. In the course of those hearings the following colloquy occurred:

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[13] While the transcript of the oral argument is not available to petitioner, the recollection of counsel on this matter is supported by the report of the argument at 27 U.S. Law Week 3275-3280.

[14] Earlier in his opinion Mr. Justice Clark had written: "But the action today may have the effect of by-passing that exemption since Greene will now claim, as has Vitarelli, see *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), reimbursement for his loss of wages. See *Taylor* v. *McElroy*, *post*, p. 709. This will date back to 1953. His salary at that time was $18,000 a year." This prediction has come true, Greene's present back-pay claim involves the fact that he received $18,000 a year from the job of which he was deprived.

> MR. WHITTEN: "What basis would there be for us paying him anything? There is no relationship which puts any responsibility upon the Federal Government."
>
> GENERAL MOORE [Special Assistant to the Comptroller, Department of Defense]: "There is certainly, I believe, one of equity and justice. These employees that we are talking about being relieved, even though temporarily, are being relieved at the suggestion of representatives of the Federal Government." (id. at 777.)

This testimony cannot have escaped the Court's attention, since the opinion in *Greene* evinces a careful study of these hearings.[15]

This Court was thus made fully aware of the existence and availability of the monetary restitution provisions of Paragraph 26 of the 1955 Defense Department Directive. And it was cognizant of the Defense Department's stated objective of achieving "equity and justice" through the application of Paragraph 26. Combined with the representations made by the Solicitor General in the *Taylor* case, these factors make it fair to conclude that in holding that petitioner Greene had been improperly deprived of his job this Court necessarily contemplated that he would receive appropriate "equity and justice" in accordance with the reimbursement provisions of Paragraph 26.

To assert that the *Greene* holding has no bearing upon petitioner's right to be made whole is to ascribe

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[15] See particularly 360 U.S. at 505, n. 30, stating that a certain passage in the testimony at those hearings was the "*only* description made to the Committee concerning the procedures used in the Department's clearance program." [Emphasis added.] Such a statement presupposes an examination of the entire testimony. The Government's brief had cited, but not discussed, this testimony. Brief for the United States, No. 180, Oct. Term, 1958, p. 27, n. 8.

to this Court an advisory and gratuitous discussion about petitioner's loss of employment opportunities and the factors that caused that loss. But once it is conceded, as it must be, that the *Greene* decision explicitly held that petitioner was deprived of his job opportunities by virtue of the unauthorized governmental actions, relevant constitutional and legal considerations compel the recognition of the right to restitution in some form. Cf. *United States* v. *Pewee Coal Co.*, 341 U.S. 114, 116-117.[16] Having taken and destroyed petitioner's property right in his job at ERCO, having destroyed his employment opportunities in his chosen profession, the United States became liable under the Fifth Amendment to the Constitution to pay just compensation for the losses suffered. "The guiding principle of just compensation is reimbursement to the owner for the property interest taken." *United States* v. *Virginia Electric Co.*, 365 U.S. 624, 633; and see *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106, 123; *Lynch* v. *United States*, 292 U.S. 571, 580. To the extent that Paragraph 26 reflects the Defense Department's desire to achieve "equity and justice," it conforms to the purpose of the Fifth Amendment's guarantee of just compensation—i.e., "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49.

With Paragraph 26 plainly before it and with the requirement of the Fifth Amendment clearly in mind,

[16] In the *Pewee* case, this Court held that from the recognition given the Government seizure of the coal mines in the prior decision in *United States* v. *United Mine Workers*, 330 U.S. 258, it followed "almost as a matter of course" that the Government "took" the Pewee coal property, and, having thus taken Pewee's property, "the United States became liable under the Constitution to pay just compensation."

this Court in *Greene* ruled that petitioner had been improperly deprived of property rights. The intent and the command of the *Greene* decision must therefore include the requirement that restitution in some form—under Paragraph 26, if not under the Fifth Amendment—be forthcoming to compensate petitioner for his acknowledged losses.[17]

D. Nothing in the Greene Decision Destroyed or Affected the Applicability of the Reimbursement Provisions of Paragraph 26 of the 1955 Defense Department Directive.

The ruling in *Greene* in no way undermined the propriety or applicability of Paragraph 26 of the 1955 Defense Department Directive. Despite the lack of authority for many of the procedural sections of that Directive, this Court gave no indication that Paragraph 26, which it directly invoked in the companion *Taylor* case, was in any degree invalidated or unauthorized. To the extent that it permits the recovery of some or all of the compensation to which petitioner became entitled, Paragraph 26 remains in full force with respect to the claim asserted thereunder.

Nor can it be said that the cancellation of the 1955 Directive by the 1960 Defense Department Directive, a cancellation motivated by the *Greene* decision, in any sense erased the applicability to petitioner's claim of Paragraph 26 of the 1955 Directive. That claim was vested and filed prior to the purported repeal of Paragraph 26. Shortly after the District Court entered the

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[17] It is for this reason that petitioner's suit in the Court of Claims is grounded on both Paragraph 26 and the Fifth Amendment. Thereby invoked is that tribunal's jurisdiction to consider claims founded either on the Constitution or on a regulation of an Executive Department. 62 Stat. 940, 28 U.S.C. § 1491.

final order of expungement on the remand of the case from this Court, petitioner made a formal demand of the Government for restitution under Paragraph 26. See R. 4. The date of that demand was December 28, 1959, exactly seven months prior to the promulgation of the 1960 Directive. Serious questions relative to the validity of the 1960 Directive would arise were it considered to be retroactive so as to preclude consideration of claims filed under the 1955 Directive prior to repeal. Such considerations make necessary the conclusion that Paragraph 26 is still available as a means of granting petitioner the restitution which the *Greene* decision contemplated.

Moreover, Paragraph 26, properly interpreted, clearly permits restitution thereunder for the losses which this Court found had been suffered by petitioner. It provides in essence that in cases "where a final determination is favorable to a contractor employee" reimbursement will be allowed "in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of earnings." Nothing in Paragraph 26 requires that that "final determination" be an administrative one; it is enough if the determination is by someone authorized to make final determinations. Cf. Paragraph V.C. of the 1960 Directive, requiring a "final administrative determination."

The opinion and judgment of this Court in *Greene*, supplemented by the District Court's order annulling and expunging "any or all rulings, orders or determinations wherein or whereby plaintiff's security clearance was revoked," plainly was "a final determination . . . favorable to a contractor employee" within the scope of Paragraph 26. Addition-

ally by expunging all the adverse determinations—including the crucial April 17, 1953, letter from the Secretary of the Navy to ERCO—the District Court in effect reinstated the prior "final" administrative determination favorable to petitioner, a determination rendered in January of 1952 by the IERB.[18] Judicial action thus resulted—for purposes of Paragraph 26—in a "final determination" favorable to *Greene*, as well as in a resurrection of a prior final and favorable administrative determination. Both of these final determinations must be considered applicable to the entire interim period of the improper suspension of clearance.[19]

Paragraph 26 of the 1955 Directive thus stands as the appropriate method of giving effect to the necessary consequence of the *Greene* decision. It is the method which this Court was given to understand would be available to make petitioner at least partly whole for the losses suffered during the period of the unauthorized job deprivation. The Court of Claims is there-

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[18] "On January 29, 1952, the IERB, on the basis of the testimony given at the hearing and the confidential reports, reversed the action of the PSB and informed petitioner and ERCO that petitioner was authorized to work on Secret contract work." *Greene* v. *McElroy*, 360 U.S. at 480. This 1952 determination stemmed from the same security charges against petitioner as led to the later adverse determinations that have been expunged.

[19] To interpret the phrase "final determination" as it appears in Paragraph 26 to mean only a new and subsequent administrative grant of clearance would deny the "equity and justice" promised by the Defense Department in establishing the reimbursement provisions. And it would leave completely unanswered the just compensation claim under the Fifth Amendment. The result would be at odds with this Court's understanding that petitioner's losses, like those of Taylor's, would be compensable under Paragraph 26.

fore duty bound to proceed at once to compute the precise amount of reimbursement due petitioner under Paragraph 26.

II. PETITIONER'S RIGHT TO RECEIVE MONETARY RESTITUTION DOES NOT NOW DEPEND UPON THE EXHAUSTION OF ANY NEW OR ADDITIONAL SECURITY CLEARANCE PROCEEDINGS

The order of the Court of Claims suspending further proceedings in this case "pending pursuant of administrative remedies by the Department of Defense," R. 9, reflects a failure to understand and abide by the necessary import of this Court's decision in *Greene* v. *McElroy*, 360 U.S. 474. As already indicated, this Court has determined that petitioner has suffered a loss of property rights in being illegally deprived of his job opportunities. From that determination it follows "almost as a matter of course," cf. *United States* v. *Pewee Coal Co.*, 341 U.S. 114, 116-117, that petitioner is entitled to reimbursement for his losses without further administrative ado.

Yet the notion persists, as perpetuated by the Government and incorporated in the Court of Claims order, that petitioner may yet obtain monetary restitution for his past losses without resort to judicial proceedings "if it is administratively determined [under the 1960 Directive] that he is entitled to access authorization."[20] Somehow it is thought that if petitioner were now to be denied access authorization in accordance with the new procedures the whole of the *Greene* decision could be avoided and petitioner's losses could be relegated to the maxim *damnum absque injuria;* on

[20] Brief for the United States in Opposition to Petition herein, p. 7.

the other hand, if petitioner were now to gain an access authorization which he does not need or want and if it were determined that the prior administrative denials of clearance were unjustified, reimbursement of loss of earnings might then be considered. Such legerdemain flouts both the holding of the *Greene* decision and the basic purposes of the administrative exhaustion principle.

A. The Insistence That Petitioner Exhaust Further Administrative Remedies As A Condition to His Right to Monetary Restitution Misconceives the Greene Decision and the Nature of Petitioner's Present Claim.

The order below requiring petitioner to pursue further administrative proceedings is traceable to the consistent contention of the Government that the *Greene* decision of this Court related to nothing more than "a procedural infirmity in the hearing which preceded the final revocation of the security clearance."[21] To the Government, the decision has meant only that the Department of Defense was required to revise its procedures in order to conform to this Court's judgment. Thus viewed, the *Greene* decision merely uncovered a procedural error in the handling of the case within the Defense Department and the case has in effect been remanded to that Department for retrial in accordance with revised procedures.[22] It is a retrial

[21] Brief for the United States in Opposition to Petition herein, pp. 6-7.

[22] Such was precisely the effect ascribed to the *Greene* decision by the Government in response to the plaintiff's motion for summary judgment in *Kreznar* v. *United States*, Ct. Cl. No. 47-60, now pending on petition for writ of certiorari, No. 85, Oct. Term, 1963, See pp. 109-110 of the *Kreznar* record on file with the Clerk of this Court.

of the security charges against petitioner that the Government now seeks, a retrial clothed in the language of exhaustion of administrative remedies.

Such an analysis of the *Greene* decision is impermissible, for it ignores the central thrust of this Court's action. The infirmities, the lack of proper authorization, found by this Court all related to procedures which caused petitioner to lose his job and his employment opportunities. The entire focus of the *Greene* decision was on the deprivation of his job and employment rights by virtue of an unauthorized procedure lacking the safeguards of confrontation and cross-examination. See *Hannah* v. *Larche,* 363 U.S. 420, 451, 452.

Such focus has never been acknowledged or accepted by the Government. It has repeatedly attempted to read the *Greene* decision as though the only concern was with faulty security clearance procedures rather than with the resulting deprivation of constitutionally protected rights.[23] This effort to revise the *Greene* ruling was dramatically illustrated in the Government's Brief in Opposition to the Petition for Certiorari, p. 3, which rewrote the critical holding so as to make it appear that this Court only held that peti-

[23] In so reading the decision, the Government merely echoes the original arguments it advanced to this Court in the *Greene* case, arguments which steadfastly ignored petitioner's claim that his constitutionally protected employment rights had been violated by the illegal and unauthorized action of the Government.

Thus, in arguing that petitioner was really seeking an order requiring the disclosure to him of Government secrets, the Government asserted that any such order "would, of course, leave open to the Government the alternative of revoking the clearance again . . . in proceedings meeting the requirements of this Court's decision." Brief for the United States, p. 48, No. 180, Oct. Term, 1958.

tioner could not be finally deprived of his security clearance by means of the unauthorized procedures.[24]

Such a translation of the *Greene* holding serves to explain the emergence of the administrative exhaustion concept in this case. By completely divorcing this Court's ruling from any determination of a denial of petitioner's constitutionally protected property rights, the semblance of an exhaustion argument can be erected.

The starting premise, of course, is a stultifying reading of the *Greene* opinion to relate it solely to a correctible procedural defect—the lack of authority for a procedure finally depriving one of his security clearance. The correction of that defect then becomes possible through the creation of the hitherto missing authority and the promulgation of more palatable procedures as to confrontation and cross-examination. And since the *Greene* ruling did not say that petitioner was entitled to a security clearance or to access to classified documents, petitioner must now exhaust the new

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[24] The nature of this attempted revision was as follows:

This Court's holding, 360 U.S. at 508:	The Government's revision, Brief in Opp., p. 3:
"We decide only that in the absence of explicit authorization from either the President or Congress *the respondents were not empowered to deprive petitioner of his job* in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." [Emphasis added.]	"On June 29, 1959, this Court held that, 'in the absence of explicit authorization from either the President or Congress', *petitioner could not be finally deprived of his security clearance* 'in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination.' *Greene* v. *McElroy*, 360 U.S. 474, 508." [Emphasis added.]

procedures of the 1960 Directive. If he thereby obtains such clearance or access, petitioner would then be considered eligible to apply for monetary restitution under Paragraph V.C. of the 1960 Directive.

The alien nature of this exhaustion argument is at once obvious. It totally ignores the central consideration of the *Greene* ruling—the established deprivation of petitioner's employment rights and opportunities. It gives no recognition to the fact that petitioner is seeking restitution for past losses, losses which were due to the past illegalities of the Government agents. And it makes the securing of present access clearance a predicate for reimbursement for losses suffered from an improper denial of clearance in the past.

The short of it is that the *Greene* decision, construed to mean what it plainly says, renders completely irrelevant and unnecessary the effort to force petitioner to obtain a new and unwanted security clearance as a condition precedent to his right to monetary restitution for past losses.

B. The Doctrine of Exhaustion of Administrative Remedies Is Totally Inapplicable Where, As Here, the Remedies Afford No Relief Commensurate with Petitioner's Claim and Concern Irrelevant Matters.

Petitioner's claim for monetary restitution was made under Paragraph 26 of the 1955 Directive. On June 1, 1961, petitioner was informed that "it has been determined by the Department of Defense that Mr. Greene does not qualify for monetary restitution under the provisions of Paragraph 26." R. 5-6. Petitioner was simultaneously advised that, upon request, the Department would "undertake the processing of his case under the July 28, 1960 Review Regulation." R. 6.

But the availability of a processing of the case under the 1960 Directive is without relation to the matters involved in the Paragraph 26 claim, which has been finally denied by the Department of Defense. The Paragraph 26 claim, as well as that made under the Fifth Amendment, seeks reimbursement for the losses incurred in the past. No claim is made for restitution under Paragraph V.C. of the 1960 Directive.

The emptiness of the requirement that petitioner now proceed before the Defense Department under the 1960 Directive becomes clear. Petitioner's claim for relief in the Court of Claims presents no question of fact (except for the calculation of the amount due) and but two questions of law: (1) whether he has a right to reimbursement under Paragraph 26 of the 1955 Directive; and (2) whether he has a just compensation claim under the Fifth Amendment. Further proceedings before the Defense Department would shed no light on either question, the Department already having denied the Paragraph 26 claim and plainly being without power to treat the constitutional issue.

The situation here finds precise parallel in the decision in *Southwestern Sugar Co.* v. *River Terminals Corp.*, 360 U.S. 411. There it was held erroneous for a Court of Appeals to remit the parties to an administrative determination of one issue when the case might have been finally disposed of by judicial resolution of any one of three other issues that were "plainly ripe for decision." To paraphrase and apply to this case the reasoning of the *Southwestern* opinion, 360 U.S. at 415, if the Defense Department were to conclude that petitioner was not entitled to restitution under the 1960 Directive, the Court of Claims "would then have to decide the very questions

which it can now decide without the necessity for any collateral proceeding." Conversely, a present ruling by the Court of Claims in petitioner's favor "might entirely obviate the necessity for proceedings" before the Department, proceedings "which would further delay the final disposition of this already protracted litigation."

In these circumstances, where the suggested administrative relief is unresponsive to the dispositive issues pending in the Court of Claims and where the Department of Defense can offer no aid in the resolution of those matters, "sound and expeditious judicial administration" compels the Court of Claims to proceed to render judgment without reference to the possibility of proceedings under the 1960 Directive. *Southwestern Sugar Co.* v. *River Terminals Corp., supra,* 415. The administrative exhaustion doctrine was never designed to withhold judicial action while the parties pursue irrelevant, unresponsive and dilatory administrative procedures. See *Smith* v. *Illinois Bell Tel. Co.*, 270 U.S. 587, 591; *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 63; *Public Utilities Comm. of California* v. *United States*, 355 U.S. 534, 539-540.[25]

Not only is the proffered procedure unresponsive to the matters *sub judice* in the Court of Claims but the matters offered to be resolved by the Defense Department are either moot or illusory:

(1) To the extent that a security board would inquire into and determine petitioner's present eligibility for access authorization, such a determination

[25] See, generally, Jaffe, *The Exhaustion of Administrative Remedies*, 12 Buff. L. Rev. 327, 329-334 (1963); 3 Davis, *Administrative Law Treatise* § 20.07 (1958).

would be a gratuitous declaration unrelated to any real need or eligibility for such authorization. Petitioner does not need or want access authorization and, not being employed by a Defense contractor, is not eligible to apply for an access authorization. The rendering of what amounts to an advisory opinion on access eligibility can hardly be elevated into the category of administrative remedies required to be exhausted. Denial or absence of present access authorization is clearly consistent with payment for losses resulting from improper or unauthorized revocation of past access clearance.[26]

(2) To the extent that a security board would reexamine and review the earlier adverse determinations, in furtherance of the provision in Paragraph V.C. of the 1960 Directive that reimbursement depends in part upon a finding "that the administrative determination which resulted in the loss of earnings was unjustified," such reexamination has been mooted. The prior adverse determinations have all been ordered expunged from the records of the Government. There is literally nothing in those records which would permit such a reexamination.

This "offer" to reopen and reexamine adverse determinations which this Court found were unauthorized and which the District Court ordered expunged underscores the illusory nature of the administrative exhaustion contention in this case. It is nothing more

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[26] Reinstatement to the position from which a Government employee was discharged is not a condition precedent to recovery of back pay for a wrongful discharge. *Gadsden* v. *United States*, 111 Ct. Cl. 487, 78 F. Supp. 126; *Watson* v. *United States*, 162 F. Supp. 755 (Ct. Cl.); *Feldman* v. *United States*, 181 F. Supp. 393, 399 (Ct. Cl.).

than an attempt, by a combination of reopening the old determinations and passing upon present access eligibility, to rehear and retry the old security charges under amended procedures. The administrative exhaustion doctrine, properly viewed, has never required one to seek such a rehearing or retrial. "As the law does not require an application for a rehearing to be made and its granting is entirely within the discretion of the Commission, we see no reason for requiring it to be made a condition precedent to the bringing of a suit to enjoin the enforcement of the order." *Prendergast* v. *New York Tel. Co.*, 262 U.S. 43, 48. See also, *United States* v. *Abilene & S. R. Co.*, 265 U.S. 274; *Levers* v. *Anderson*, 326 U.S 219.[27]

(3) Additionally, the purported remedy before the Defense Department is by its own terms discretionary. Even if it were determined that access authorization was presently permissible and even if the prior expunged determinations were found to be unjust, Paragraph V.C. of the 1960 Directive states that reimbursement "may be allowed" if the claim is "administratively determined to be just and equitable." Such discretionary relief need not be pursued and is inadequate to oust the duty of the Court of Claims to proceed to adjudicate the matters pending before it. *Smithmeyer* v. *United States*, 147 U.S. 342, 357-358; see also *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630, 635-636.

(4) If petitioner were to proceed as suggested before the Department of Defense and if the Depart-

[27] And see § 10(c) of the Administrative Procedure Act, 5 U.S.C. § 1009, providing that agency action otherwise ripe for judicial review "shall be final for the purposes of this subsection whether or not there has been presented or determined any application for . . . any form of reconsideration."

ment were to resolve any issue against him, thereby precluding him from restitution under the 1960 Directive, he would be seriously prejudiced in his suit in the Court of Claims. It would appear to be the logic of the Government's position that instituting a proceeding under the 1960 Directive would be deemed a waiver of rights under the 1955 Directive, particularly Paragraph 26 thereof. Having invoked the provisions of the 1960 Directive, petitioner could be said to have made a final choice to accept all the benefits and risks thereunder. Suffice it to say that such a possible result is not among the considerations warranting invocation of the administrative exhaustion doctrine.

In fact, to the extent that it is relevant, the administrative exhaustion doctrine has been more than amply respected in this prolonged proceeding. The security proceedings before the Department of Defense were prolix and extensive, and they resulted in a final determination as to petitioner's security clearance.[28] Lengthy court proceedings then ensued, resulting in this Court's decision in 1959. Petitioner, immediately after the entry of the District Court order on remand, made demands upon the Defense Department for monetary restitution under Paragraph 26 of the 1955 Directive. For nearly a year and a half the Department kept the demands under consideration, finally rejecting them on June 1, 1961. R. 5-6.

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[28] In paragraph 17 of petitioner's original complaint in the District Court, it was alleged that he had "exhausted all administrative remedies available to him." R. 8, No. 180, Oct. Term, 1958. The Government's original answer admitted that allegation, R. 16, although its amended answer denied it "in that plaintiff was allowed under the regulations to make a motion for reconsideration." R. 26, No. 180, Oct. Term, 1958.

Now to be met with offers and demands that petitioner seek further administrative relief is to entertain an abuse of the administrative exhaustion principle. This Court, having studied the record of petitioner's previous security hearings,[29] and of other similar hearings as well,[30] will readily understand why petitioner is unwilling to endure another round. Apart from their procedural inadequacies, such hearings violently intrude into the individual's privacy, subjecting his entire life to hostile scrutiny. There is no need to consider here whether they are a necessary and proper price for the preservation of government secrets. Petitioner does not seek access clearance. This is a suit for money. It should be tried by the courts, not by a security board.

CONCLUSION

By reason of the foregoing, the order of the Court of Claims should be vacated or reversed and that tribunal should be directed to proceed with the computation of the restitution clearly due the petitioner.

Respectfully submitted,

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September 3, 1963.

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[29] Proceedings of January 23, 1952 before the Industrial Employment Review Board, Transcript of Record, No. 180, Oct. Term, 1958, pp. 39-171; proceedings of April 28, 29, 30, 1954 before the Eastern Industrial Personnel Security Board, *Ibid.*, pp. 184-461.

[30] See, e.g., *Vitarelli* v. *Seaton*, 359 U.S. 535, particularly note 5, pp. 542-544.

APPENDIX

United States Constitution, Amendment V:

> No person shall be * * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Department of Defense Directive 5220.6, 20 Fed. Reg. 1553, issued February 2, 1955: * * * par. 26:

> *Monetary Restitution.* In cases where a final determination is favorable to a contractor employee, the department whose activity originally forwarded the case to the Director will reimburse the contractor employee in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance. Such amount shall not exceed the difference between the amount the contractor employee would have earned at the rate he was receiving on the date of suspension and the amount of his interim net earnings. No contractor employee shall be compensated for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under this regulation.

Department of Defense Directive 5220.6, 25 Fed. Reg. 7523, issued July 28, 1960:

> V. *Miscellaneous*
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> * * * B. *Reconsideration of Prior Decisions* * * *
> 1. Decisions rendered under any industrial personnel review program prior to the effective date of this Regulation which denied or revoked an access authorization may be reconsidered by such boards as the Director deems appropriate at the request of the applicant, addressed through the Director, after a finding by the appropriate board that there is newly dis-

covered evidence or that other good cause has been shown. Whenever a final determination of denial or revocation based upon a personal appearance proceeding is found to have been unauthorized at the time it was made, authority is hereby delegated to the Director, Office of Industrial Personnel Access Authorization Review, to vacate such final determination and all subsequent administrative action predicated thereon and to take such other steps as may be deemed necessary to complete reconsideration of the case.

* * * *

C. Monetary Restitution.

If an applicant suffers a loss of earnings resulting directly from a suspension, revocation, or denial of his access authorization, and at a later time a final administrative determination is made that the granting to him of an access authorization at least equivalent to that which was suspended, revoked or denied, would be clearly consistent with the national interest and it is determined by the board making a final favorable determination that the administrative determination which resulted in the loss of earnings was unjustified, reimbursement of such loss of earnings may be allowed in an amount which shall not exceed the difference between the amount the applicant would have earned at the rate he was receiving on the date of suspension, revocation, or denial of his access authorization and the amount of his interim net earnings. The filing and processing of any such claim shall be in accordance with such regulations as the Secretary of Defense may prescribe after consultation with the Administrators. Payment shall be limited to claims administratively determined to be just and equitable. No applicant shall be compensated for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under any industrial personnel

review program. Payment under this provision shall be in full satisfaction of any and all claims, of whatever nature they may be, which the applicant has or may assert against the United States, or the Department of Defense or any of its agencies or activities, or the Federal Aviation Agency, or the National Aeronautics and Space Administration, or any of them, by reason of or arising out of the suspension, revocation or denial of access authorization.

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CITATIONS

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Constitution, Statutes and Regulations:

QUESTION PRESENTED

Whether the Court of Claims erred in suspending proceedings in a suit for a money judgment arising out of an adverse determination relating to authorization for access to classified information, pending pursuit by petitioner of his administrative remedies before the Department of Defense.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent parts of the Fifth Amendment, of the Tucker Act, 28 U.S.C. 1491, and of the applicable regulations of the Department of Defense are set forth in the Appendix, *infra*, pp. 30–39.

STATEMENT

The facts comprising the background of this litigation are fully set forth in this Court's opinion in *Greene* v. *McElroy*, 360 U.S. 474, 476–491.

In 1951 petitioner was vice-president and general manager of Engineering and Research Corporation (ERCO). On December 11, 1951, he was informed by the Army-Navy-Air Force Personnel Security Board (PSB) that his authorization for access to classified information was being preliminarily revoked pending a hearing before the Industrial Employment Review Board (IERB). Petitioner appeared at the hearing on January 23, 1952, and on January 29, 1952 the IERB reversed the action of the PSB and informed petitioner and his employer that he was authorized to work on secret contract work.

On April 17, 1953, the Secretary of the Navy notified petitioner that he had concluded that petitioner's

continued access to classified Navy information was inconsistent with the best interest of national security, and requested ERCO to bar petitioner from all classified projects and information.[1] Petitioner was discharged by ERCO a week later. Following petitioner's request for reconsideration, the Navy informed him that it had requested the Eastern Industrial Personnel Security Board (EIPSB) to accept jurisdiction and to make a final determination concerning petitioner's status. On April 28, 1954, a hearing was held, and the EIPSB reached the same conclusion as had the Secretary. On September 15, 1955, petitioner requested review by the Industrial Personnel Security Review Board, and on March 12, 1956, he received a letter from the Director of the Office of Industrial Personnel Security Review affirming the determination of the EIPSB.

Petitioner then brought an action in the United States District Court for the District of Columbia seeking a declaration that the revocation of his clearance was unlawful and appropriate injunctive relief. On June 29, 1959, this Court held that, "in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." *Greene* v. *McElroy*, 360 U.S. 474, 508. On remand, the district court entered a consent order which (1) declared the final revoca-

[1] At the time the Secretary acted, the PSB and IERB had been abolished. See *Greene* v. *McElroy*, 360 U.S. 474, 480–483.

tion of petitioner's security clearance to be unauthorized; and (2) directed the expunging of all rulings, orders or determinations wherein or whereby the clearance was revoked (R. 3; Pet. Br. 3–4).

Thereafter, on December 28, 1959, petitioner made a demand on the General Counsel of the Department of the Navy for monetary restitution under paragraph 26 of the former (1955) Industrial Personnel Security Review Regulation, 20 Fed. Reg. 1553, § 67.5–4, Appendix, *infra*, p. 33 (R. 4). The General Counsel acknowledged receipt of this demand on January 11, 1960 (R. 4), and on April 20, 1960, petitioner supplied the General Counsel with additional information and claimed a loss of earnings of $49,960.41, from the date of dismissal to December 31, 1959 (R. 4).

Pursuant to express authority from the President (Executive Order 10865, February 20, 1960, 25 Fed. Reg. 1583), the Secretary of Defense, on July 28, 1960, issued a new Industrial Personnel Access Authorization Review Regulation (25 Fed. Reg. 7523). Responding to the Court's criticism in *Greene* v. *McElroy, supra,* the new procedures (§ 67.4–5(b), Appendix, *infra,* pp. 35–38) accorded the right of cross-examination in all cases, with the limited exceptions expressly authorized by the President. Section 67.5–2(a) of the regulation provided for reconsideration, at the employee's request, of cases in which a final determination of denial or revocation was based on a proceeding which was found to have been unauthorized at the time it was made (Appendix, *infra,* p. 38). In section 67.5–3, the regulation provided for monetary restitu-

tion for loss of earnings resulting directly from a suspension, revocation, or denial of access authorization, in the event it was ultimately determined that the employee was entitled to security clearance and that the initial contrary ruling was unjustified (Appendix, *infra*, pp. 32–39). The policy section of the regulations contained, however, a statement that such a favorable determination was not, in and of itself, an access authorization, nor was it in any sense a determination that the applicant concerned actually required access to classified information (§ 67.1–4(b), Appendix, *infra*, p. 34).

On February 8, 1961, the Director, in response to petitioner's request, gave him an opportunity to submit in writing additional material on his legal position with respect to his claim for monetary restitution under Paragraph 26 of the Directive of 1955. Further, the Director advised that the Department was prepared, at petitioner's request, to consider his case under the Industrial Personnel Access Authorization Review Regulation of July 28, 1960, and to take such action as might be necessary to reach a final determination as to petitioner's access authorization (R. 4).

On March 2, 1961, petitioner restated his position as to the applicability of the monetary restitution provision of the Regulation of February 2, 1955, and declined to request consideration of his case under the 1960 review regulation, on the ground that an adverse decision under the latter might foreclose his claim for loss of earnings under the earlier regulation (R. 5). Thereafter, in correspondence with petitioner, the Director reiterated the Department's willingness to undertake the processing of petitioner's

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case under the 1960 regulation. Petitioner did not make such request, and, on June 1, 1961, the Department of the Navy, to which he had originally presented his claim, advised petitioner that he "does not qualify for monetary restitution under the provisions of Paragraph 26 [of the 1955 regulation] and that, therefore, his claim, being premature, cannot be given further consideration at this stage of the administrative proceedings" (R. 5–6).

Petitioner commenced this action in the Court of Claims on May 7, 1962, claiming money damages based on the Fifth Amendment and Paragraph 26 of the 1955 regulation (R. 1). The government filed a motion to suspend proceedings on July 5, 1962 (R. 7), which motion was denied on September 5, 1962 (R. 8). On December 5, 1962, before the extended time for filing an answer had elapsed, the Commissioner of the Court of Claims entered an order suspending proceedings pending petitioner's pursuit of his administrative remedies in the Department of Defense (R. 9).[2]

Petitioner then requested review by the Court of Claims of the Commissioner's Order (R. 9). On December 20, 1962, the Court of Claims denied petitioner's request for review (R. 9).

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[2] As the Order recites, the Commissioner's action was premised on the similar course followed by the Court of Claims in the cases of *Stephen L. Kreznar* v. *United States* and *Novera H. Spector* v. *United States*, proceedings suspended December 5, 1962, now pending on petition for certiorari, No. 85, this Term.

ARGUMENT

INTRODUCTION AND SUMMARY

The central theme of petitioner's argument is summed up in the maxim he attributes to Mr. Justice Cardozo: "Illegality established, liability ensues." (Pet. Br. 35.) He argues, in effect, that when this Court held unauthorized the final revocation of his clearance to view government secrets, which, as a practical matter, deprived him of his job, he then became entitled, without more, to recover whatever economic damages resulted from the loss of that employment. In sum, his present contention suggests that, but for the awkward division of jurisdiction between the district courts and the Court of Claims, the original suit should have contained a prayer for damages, and that, upon remand from this Court, the trial court might have simply taken evidence on the extent of the injury and awarded a money judgment. But the matter is not so simple.

Read out of context, the quoted maxim no longer holds true. With respect to the government at least, there are a dozen instances where illegal or unauthorized action does *not* give rise to damages in favor of the person injured. One need only consult the text and the jurisprudence of the Tucker Act and the Tort Claims Act. See 28 U.S.C. 1491, 2680. Moreover, even if liability ultimately ensues, it may be limited or conditioned on a further showing. See, *e.g.*, 10 U.S.C. 1552; 28 U.S.C. 2513. And preliminary determination may be confided to the exclusive jurisdiction of an administrative tribunal. See, *e.g.*, 41 U.S.C. 113; 42 U.S.C. 405 (g)–(h); 46 U.S.C. 740,

1292. See, also, 31 U.S.C. 71; 28 U.S.C. 2675. That is this case.

Here, the finding that petitioner was improperly deprived of his job does not automatically accrue a right to recover damages for lost earnings. As we will show, no such right as against the United States exists at all, except insofar as it was granted by Regulations of the Department of Defense. Under the Constitution and the stautory law, the government is no more liable here than it is when a criminal judgment is vacated because the trial was infected with error (albeit of constitutional proportions) and the defendant loses his job as a result of the wrongful conviction. At the very least, the claim must abide the outcome of the retrial. See 28 U.S.C. 2513.

Indeed, that is the rule embodied in the Department regulations. As one would expect, before restitution is allowed, those regulations require a further showing, at the administrative level, that the challenged revocation of access authorization was not only procedurally incorrect, but substantively wrong. The reason is that, though the final revocation was accomplished under inadequate procedures, there remains the question whether the procedural error is the cause of the revocation, or whether, tested by correct procedures, his clearance still should have been finally revoked, in which event his losses can hardly be attributed to the government's action in achieving the right result by the wrong means. In short, before damages are due, it must be established that there would have been no damages but for the government's wrongful act.

Under the circumstances, the administrative remedy

seems wholly adequate. At the very least, there is no sufficient excuse for not initially submitting the claim to the Department's procedures. Petitioner having refused to exhaust that remedy, his suit is premature. We submit that the court below was plainly correct in requiring that this be done before it undertook to review the administrative determination or to entertain novel constitutional claims.

I.

THE COURT BELOW PROPERLY SUSPENDED JUDICIAL PROCEEDINGS PENDING EXHAUSTION OF AN AVAILABLE AND ADEQUATE ADMINISTRATIVE REMEDY

The existence of an administrative remedy is not disputed. Indeed, petitioner's claim (R. 1, 4, 7) is founded in part on Paragraph 26 of a Department of Defense Directive issued in 1955 (former § 67.5–4 of the Industrial Personnel Security Review Regulation, Appendix, *infra* p. 33), which, under stated circumstances, requires the affected military department to "reimburse the contractor employee in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance." And the current regulation, in effect since July 1960, makes like provision for monetary restitution (§ 67.5–3, Appendix, *infra* pp. 38–39). Since, as we show, both versions of the regulation contemplate further departmental proceedings, the Court of Claims quite properly required petitioner to pursue his administrative remedy before ruling on his novel constitutional claims.

That course is permissible in most cases even where no constitutional issue is involved. "[T]he long settled rule of judicial administration [is] that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51. See, also, *Natural Gas Company* v. *Slattery*, 302 U.S. 300, 311. But judicial abstention is particularly appropriate where, as here, the administrative determination might moot a constitutional question. See *Aircraft & Diesel Equipment Co.* v. *Hirsch*, 331 U.S. 752, 772–774; *Beard* v. *Stahr*, 370 U.S. 41. It seems almost compelled in a case like this one where this Court has deliberately avoided decision of the underlying constitutional issues.

What, then, is petitioner's answer? Initially, he complains that the required procedures are burdensome and will postpone recovery. Those considerations might be determinative if, as in the cases petitioner cites, this were a suit to enjoin continued interference with the exercise of a declared constitutional right. See, *e.g.*, *California Comm'n* v. *United States*, 355 U.S. 534. But the present complaint is no longer addressed to the extraordinary relief of equity. Whatever invasion of right was involved has long since been enjoined; what remains is an ordinary suit for damages which tolerates the normal delays of deliberate legal process. Moreover, as our examination will show, the claim made outside the regulations stands upon the most dubious footing. No injustice will be done if its assertion is a little delayed.

More to the point, petitioner makes two further objections. First, he insists that he has in fact exhausted the only appropriate administrative remedy and is now entitled to review of the arbitrary denial of his claim by the Department of Defense. Then, somewhat alternatively, he argues that the suggested administrative remedy is inadequate for a variety of reasons. We shall consider each of these contentions in turn.

1. Under the 1955 regulation, the obligation to make monetary restitution arises when "a final determination is favorable to a contractor employee" whose security clearance was originally suspended (Appendix, *infra* p. 33). Construing this Court's ruling in *Greene* v. *McElroy*, 360 U.S. 474, or the district court's order on remand "expunging" the earlier revocation of his security clearance (*supra*, pp. 3–4), as such "a final determination," petitioner argues that all he need do to obtain the relief promised by the regulation is to file a claim with the Defense Department, which he has done. The current regulation (Appendix, *infra*, pp. 33 ff), which he concedes contemplates further administrative proceedings, petitioner says cannot be invoked against him since his claim was filed before it became effective.

Pretermitting the last point, petitioner's argument founders on a misconception of the 1955 regulation on which he relies. Very plainly, the "favorable" "final determination" of which the provision speaks is a restoration of eligibility for access to classified information. That reading is compelled by the context. The restitution provision is part of a regulation which

deals exclusively with the grant or denial of authorization for access to government secrets. More particularly, the section in question follows a series of provisions dealing with the review of a preliminary denial or revocation of clearance, ending with the "determination" of the Review Board, which "shall be final" subject to reconsideration or reversal by the Secretary of Defense. See 32 C.F.R. (1954 ed., Jan. 1, 1960, Pocket Supplement), § 67.4–8. Obviously, the section invoked is concerned with the injury resulting from a suspension of access authorization which is later administratively terminated.

Thus, the prerequisite to monetary restitution under the regulation is an end of the suspension, a closing of the interim. That has not happened here. As petitioner concedes (Pet. Br. 24), and as Mr. Justice Harlan stated in his concurring opinion, "there is nothing in the Court's opinion [in *Greene* v. *McElroy*] which suggests that petitioner must be given access to classified material." 360 U.S. at 510. Nor could there be. Finding only that the Department's action was procedurally defective, the Court did not have occasion to determine, as a matter of law, that there was no sufficient basis for final revocation of petitioner's access authorization. While the analogy to a criminal proceeding is not altogether satisfactory, the Court in effect vacated the judgment, leaving the charge and resulting suspension in effect, and remanded the matter for a "new trial" by correct proceedings, should petitioner wish to pursue the case.

The short of it is that, while petitioner is free to let matters stand, to bring himself within the regula-

tion he invokes he must at least show that he was entitled to clearance during the period for which he claims damages by reason of the denial of clearance. That is what the 1960 provision expressly requires. But, whether his claim is judged under the old or the new regulation, under the circumstances of petitioner's case, the test is the same. As the current provision makes plain, that determination is properly one to be made at the administrative level. Improved procedures are available for that purpose. They have repeatedly been offered to petitioner. Even now, the remedy is open. Petitioner has not been denied; he has simply declined to exhaust the tendered procedures.

2. The claim that the proffered remedy is inadequate is quickly disposed of. The short answer is that given by this Court in *Gusik* v. *Schilder*, 340 U.S. 128, 133, "If [the suggested administrative proceeding] proves to be [futile], no rights have been sacrificed." The announced fear that resort to the proceedings required by the regulations will be construed as a "waiver" of judicial rights is chimeric. If nothing else, this Court stands in the way. But, in any event, there is no merit in petitioner's complaints.

What has already been said answers the objection that a finding of past and present eligibility for security clearance is inappropriate when the claimant neither needs nor asks for clearance. As the present regulation makes clear, actual access is not involved; the required determination is simply that an authorization "would be" granted upon de-

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mand and a showing of need.[5] The current regulation, it is true, also requires a finding that the former administrative determination was "unjustified." But, though it might be appropriate in petitioner's case because of the long interval involved,[6] the Department of Defense advises us that no such showing will be required here, in light of the fact that petitioner's claim was initially filed under the 1955 regulation, at a time when the actual practice was not to undertake a separate review of the correctness of the initial decision.[7]

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[5] See, also, § 67.1–4(b) of the 1960 regulation (Appendix, *infra*, p. 34): "A determination under this Part 67 favorable to an applicant is not, in and of itself, an access authorization; nor is it in any sense a determination that the applicant concerned actually requires access to classified information."

[6] Petitioner is less than clear about the period for which he claims damages. Originally (R. 7), he demanded the amount payable under the 1955 regulation to the date of the filing of his petition in the Court of Claims plus an "equal amount" for future loss of earnings. Now, however, he seems content with compensation for the period covered by the monetary restitution provision of the old regulation, which ends, at the latest, on the date his qualification for security clearance is administratively declared. In any event, it is plain that no damages can be recovered for loss of earnings after restoration of clearance. The period involved, in any case, covers over ten years (petitioner's discharge from employment, resulting from final revocation of his clearance, having been effected on April 23, 1953), and the amount is substantial (see R. 6).

[7] So saying, we do not intend to bind the Department's procedure in a different case. The additional requirement of the 1960 monetary restitution provision is not deemed applicable to petitioner's case only because his claim, filed under the former rule, was not finally rejected until after the new regulation became effective and it is thought fair to accord the full substantive benefits of the earlier provision, while, at the same time, providing the more generous procedural safeguards now in force.

We do not understand petitioner to contest the adequacy of the award which might be forthcoming under the 1955 regulation. Nor is there any basis for such a complaint. The restitution provision requires reimbursement "for any loss of earnings" "not [to] exceed the difference between the amount the contractor employee would have earned at the rate he was receiving on the date of suspension and the amount of his interim net earnings" (Appendix, *infra* p. 33). That is clearly the fair measure of the damages incurred. Indeed, this Court so ruled in dismissing as moot the petition in *Taylor* v. *McElroy*, 360 U.S. 709, on the understanding that the claimant there would be paid in accordance with the same regulation.

Petitioner objects, however, to the apparently discretionary provision for restitution in the current regulation, under which he assumes his claim will be decided if he submits it to the Department of Defense. We do not so read the correspondence between the Department and petitioner. But, in any event, we are assured by those responsible that reimbursement will not be withhheld if petitioner makes the showing required by the 1955 regulation, as we have outlined it here. Of course, his eligibility will be determined in accordance with the current liberal procedures; but no right to restitution available under the former regulation will be denied.

There is, in sum, no obstacle to the pursuit of available and plainly adequate administrative proceedings. The action of the court below, remitting petitioner to those remedies, seems plainly correct.

II.

IN ANY EVENT, THERE IS NO PRESENT RIGHT TO DAMAGES OUTSIDE THE REGULATIONS OF THE DEPARTMENT OF DEFENSE

The argument just concluded demonstrates, we submit, that, whatever petitioner's rights may be, the court below properly required him, in the first instance, to exhaust available administrative remedies. But the result is the same if his alternative claims are now considered. The fact is that, outside the regulations, there is no basis for petitioner's claim to damages. At least, no cause of action has yet matured.

A. THIS COURT DECLARED NO SUCH RIGHT TO DAMAGES IN GREENE V. MCELROY

We fully agree with petitioner that the "critical and the only holding in the *Greene* case was 'that in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination.'" 360 U.S. at 508 (Pet. Br. 22). Accordingly, the Court declared void the Defense Department's action in finally revoking petitioner's security clearance and directed the district court to enter appropriate orders. In obedience to the mandate, the district court ordered the final revo-

cation "expunged" from the records (R. 3; Pet. Br. 4, n. 1). There is in this not one hint that petitioner is "therefore" entitled to damages.*

Of course, the Court noted that petitioner had suffered a pecuniary loss by reason of the withdrawal of his security clearance. But that merely justified the intervention of equity, since "[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Beacon Theatres* v. *Westover*, 359 U.S. 500, 506–507. Indeed, while we hesitate to join petitioner in guessing the Court's unspoken assumptions, it would seem that the injunction was appropriate, at least in part, because petitioner had no clear right to compensation by way of damages. Cf. *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 585.

Nor does the Court's opinion supply the necessary predicate for a money award. Albeit the Court found constitutionally protected "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference,"

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* True, Mr. Justice Clark, in dissent, expressed some fear that petitioner might recover damages. See 360 U.S. at 513, 523–524. Of course, insofar as the Justice was merely predicting the outcome of subsequent administrative proceedings, as the reference to *Taylor* v. *McElroy*, 360 U.S. 709, suggests, there is no assertion of an "automatic" right to "restitution." The analogy to *Vitarelli* v. *Seaton*, 359 U.S. 535, on the other hand, seems misplaced, since the claimant there, unlike the present petitioner, was a government employee who was ordered reinstated by this Court and thus became eligible for back-pay under an express statutory provision. See 5 U.S.C. 22–1. It is needless to add that this dissenting view can hardly be made the premise for a broad reading of the Court's holding.

360 U.S. at 492, it expressly declined to rule that the government's action was procedurally or substantively unconstitutional, characterizing it only as "unauthorized." 360 U.S. at 508. Much less did the Court decide, or even intimate, that the denial of access to government secrets, under the circumstances, amounted to a "taking" for which "just compensation" was due under the Fifth Amendment. There is accordingly no basis whatever in this Court's opinion in the former case for petitioner's present claim under the Constitution.

Nor does the holding that the procedures followed were unauthorized, of itself, give a right to recover damages. For, as we show, the government is not usually accountable in money for acts which are merely unauthorized, and the exception made here by the Defense regulations requires a further finding which this Court could not, and did not, make. Indeed, petitioner himself says the Court "rejected any notion that [he] was * * * entitled to a ruling restoring his access authorization" merely because the final revocation of the clearance was procedurally defective (Pet. Br. 24). See the concurring opinion of Mr. Justice Harlan, 360 U.S. at 510. Yet, as we have seen, that is precisely the ruling which the applicable regulations require before the right to "restitution" accrues. Quite properly, the Court left that determination to the agency concerned, where it belonged.

B. THE FIFTH AMENDMENT GRANTS NO SUCH RIGHT TO DAMAGES

We have already indicated our view that the court below properly declined to resolve the undecided con-

stitutional questions until petitioner had exhausted available administrative remedies which might moot the case. We urge additionally, if the Court should find it appropriate to reach the question, that there is no basis here for an award under the Fifth Amendment.

1. It is not clear whether petitioner asserts a claim under the Due Process Clause of the Fifth Amendment, or only under the Just Compensation Clause (Compare R. 1, 6–7, 10–11 with Pet. 18–20 and Pet. Br. 29). In the premises, however, no Due Process claim can prevail. There is the gravest doubt whether recovery of damages on account of governmental action is ever available on the sole ground that the Bill of Rights has been violated.[7] While this Court has left the question open, see *Bell* v. *Hood*, 327 U.S. 678; *Wheeldin* v. *Wheeler*, 373 U.S. 647, every reported decision directly ruling on it has denied the existence of any such cause of action. *Bell* v. *Hood*, 71 F. Supp. 813 (S.D. Cal.); *Johnston* v. *Earle*, 245 F. 2d 793 (C.A. 9); *Dupree* v. *United States*, 141 F. Supp. 773, 136 Ct. Cls. 57. But, even if the right exists in some cir-

[7] The early cases of *Wiley* v. *Sinkler*, 179 U.S. 58, 64–65, and *Swafford* v. *Templeton*, 185 U.S. 487, 491–493, ruling that, on a proper complaint followed by sufficient proofs, damages may be recovered against the offending officials on account of a denial of the right to vote in a congressional election, are distinguishable. Those decisions are premised on the distinction, first recognized in *Ex parte Yarbrough*, 110 U.S. 651, and reaffirmed in *United States* v. *Classic*, 313 U.S. 299, 314–315, between the "affirmative" rights conferred by the original Constitution (here, Art. 1, § 2), and those which are merely protected against governmental invasion—the "negative" rights of the Bill of Rights and the Fourteenth Amendment.

cumstances, there are insurmountable obstacles to recovery here.

In the first place, it has not been shown that petitioner was ever denied constitutional due process. This Court advisedly refrained from holding that the procedures under which petitioner's security clearance was revoked, if authorized by the President or by Congress, would violate the Fifth Amendment. The decisions recognizing the special problems of national security and the necessarily broad scope of governmental discretion in this area suggest that the requirements of due process were satisfied here. See *Totten* v. *United States*, 92 U.S. 105; *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537; *Carlson* v. *Landon*, 342 U.S. 524; *United States* v. *Reynolds*, 345 U.S. 1; *Slaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206; *Jay* v. *Boyd*, 351 U.S. 345; *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886. Cf. *Hannah* v. *Larche*, 363 U.S. 420.

Moreover, even assuming a violation of the Fifth Amendment, it would seem a prerequisite to recovery of damages to show that the injury is attributable to the procedural defect and would not otherwise have been incurred. As the Court of Claims said in *Dupree's* case, *supra*, where the claimant had been denied authority to act as a ship's master on security grounds under procedures which the court assumed unconstitutional: "If it is possible at all in a case such as this to state a case founded on the Constitution, it would, at least, be necessary to allege facts to show that, except for this violation of his constitutional rights, the certificate could have been granted him, and he would have

been permitted to follow his vocation and would have earned the wages for which he sues." 141 F. Supp. at 776, 136 Ct. Cls. at 61.

Finally, there is the obstacle of sovereign immunity, not involved in *Bell* v. *Hood* or *Wheeldin* v. *Wheeler*.* Though the Tucker Act, 28 U.S.C. 1346, 1491, permits suits against the United States "founded * * * upon the Constitution," that provision has never been understood to waive governmental immunity except for claims under the Just Compensation Clause of the Fifth Amendment. Whatever the status of the offending officers, compare *Barr* v. *Matteo*, 360 U.S. 564, with *Wheeldin* v. *Wheeler*, *supra*, the United States itself remains immune from damage claims arising out of the unauthorized or tortious acts of its agents, though constitutional rights are invaded. One view is that the final phrase of the Tucker Act, "not sounding in tort," qualifies the whole provision. *Schillinger* v. *United States*, 155 U.S. 163; but see, *Dooley* v. *United States*, 182 U.S. 222, 224. But, whether under this rationale or another, the rule is well settled. *Hooe* v. *United States*, 218 U.S. 322; *Basso* v. *United States*, 239 U.S. 602; *Ball Engineering Co.* v. *White & Co.*, 250 U.S. 46, 57; see *United*

* In *Bell* v. *Hood* recovery was sought against F.B.I. agents in their individual capacities, and in *Wheeldin* v. *Wheeler* the damage claim was asserted against an investigator of the House Un-American Activities Committee who, it was conceded, was not acting sufficiently within the scope of his authority to bring into play the immunity doctrine of *Barr* v. *Matteo*, 360 U.S. 564. In both cases, the suit was filed in the district court under the general "federal jurisdiction" provision, now 28 U.S.C. 1331, not, as here, in the Court of Claims under the Tucker Act.

States v. *North American Co.*, 253 U.S. 330, 333; *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 585; *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 166, n. 12. Accordingly, insofar as the present claim against the government rests on a supposed violation of the Due Process Clause, there is no jurisdiction to entertain it,* and, in any event, the suit is barred by the principles of sovereign immunity, consent having been withheld.

2. This brings us to the claim asserted under the Just Compensation Clause of the Fifth Amendment (Pet. Br. 29). While some of the same considerations apply, additional obstacles, plainly insurmountable, defeat recovery on this ground. Petitioner's assumption to the contrary notwithstanding, it does not follow from the premise that the right to pursue one's occupation free of unwarranted governmental interference "comes within the 'liberty' and 'property' concepts [of the Due Process Clause] of the Fifth

* Even if the Fifth Amendment contemplated a recovery in damages for violation of the due process guarantee, the complaint would not lie unless jurisdiction to entertain it has been conferred by Congress. That is true even where waiver of sovereign immunity is not involved, as the discussion in *Bell* v. *Hood*, 327 U.S. at 680, 683, 685; and *Wheeldin* v. *Wheeler*, 373 U.S. at 649–652, plainly implies. The need for express jurisdictional power is all the greater when the suit is against the United States. *United States* v. *Sherwood*, 312 U.S. 584. Whatever latitude there may be to fashion a remedy when the sovereign is not sued (see the dissenting opinion of Mr. Justice Brennan in *Wheeldin* v. *Wheeler*, *supra*, at 653–667), the present claim, even if sanctioned by the Constitution, will not lie unless the Tucker Act gives the Court of Claims jurisdiction to hear it. See *United States* v. *North American Co.*, 253 U.S. 330, 335; *Lynch* v. *United States*, 292 U.S. 571, 582.

Amendment," 360 U.S. at 492, that the right is "private property" within the Just Compensation Clause, or that, under the present circumstances, it was "taken for public use."

So far as we are aware, no one has ever suggested that a purely abstract right of this character, which the government can in no sense appropriate to its own use, is susceptible of a "taking." On the contrary, it has been said that the word "property" in the Just Compensation Clause was intended "to denote the group of rights inhering in the citizen's relation to *the physical thing*, as the right to possess, use and dispose of it." *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (emphasis added). While that description may be too narrow, see *e.g.*, *James* v. *Campbell*, 104 U.S. 356 (patent rights); *Lynch* v. *United States*, 292 U.S. 571 (contract rights), it is clear that not all "economic interests," *United States* v. *Willow River Co.*, 324 U.S. 499, 502, indeed, not all "rights," *U.S. ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 279–283, qualify as "private property" under the Fifth Amendment. Before a right is compensable under the Constitution it must at least be susceptible of transfer. *Kimball Laundry* v. *United States*, 338 U.S. 1, 5. For, otherwise, it can of course have no "market value," which is the measure of the compensation due. See *United States* v. *Miller*, 317 U.S. 369. Plainly, the negative right here alleged to have been invaded is not "property" for which the government owes compensation.

Nor was there a "taking" in the constitutional sense. On the face of it, it seems absurd to speak of the gov-

ernment's "acquiring" a purely personal right, and one that runs *against* the government. It is true that destruction of property is sometimes assimilated to a "taking," but in those cases the interest affected is at least susceptible of acquisition. See, *e.g.*, *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166 (destruction of land by flooding); *United States* v. *Welch*, 217 U.S. 333 (closing of a private right of way); *United States* v. *Causby*, 328 U.S. 256 (damage to land by overflights). Here, the supposed governmental invasion of a constitutional right no more qualifies as a taking than the "frustration" of an enterprise ruled noncompensable in *Omnia Co.* v. *United States*, 261 U.S. 502, and *United States* v. *Grand River Dam Authority*, 363 U.S. 229. Cf. *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155.

Moreover, even if it can be said that the government officials involved had the requisite intent to take, see *Tempel* v. *United States*, 248 U.S. 121; *Mitchell* v. *United States*, 267 U.S. 341, 345; *United States* v. *Central Eureka Mining Co.*, *supra*, at 166, the action, being unauthorized, could not render the United States liable under the Just Compensation Clause. *Schillinger* v. *United States*, 155 U.S. 163, 168; *Ball Engineering Co.* v. *White & Co.*, 250 U.S. 46, 54–57; *United States* v. *North American Co.*, 253 U.S. 330, 333; *Mitchell* v. *United States*, *supra*; *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 585; *United States* v. *Central Eureka Mining Co.*, *supra*, at 166, n. 12. The logic of the rule is incontestable: the subject matter of the Just Compensation Clause is the power of eminent domain, *Bedford* v. *United States*, 192 U.S. 217, 224;

United States v. *Carmack*, 329 U.S. 230, 241–242; that power is preeminently an attribute of sovereignty, *United States* v. *Jones*, 109 U.S. 513, 518; *Louisiana Power & Light Co.* v. *Thibodaux City*, 360 U.S. 25, 28; the sovereign, being the source of authority, is incapable of *ultra vires* acts; unauthorized takings are therefore not exercises of the power of eminent domain and the sovereign accordingly is not accountable under the Just Compensation Clause. The reasons of policy are equally plain: a reading of the Just Compensation Clause of the Fifth Amendment which permitted recovery against the United States on account of tortious appropriations by its officers would, in effect, circumvent the whole principle of sovereign immunity and force upon the government all manner of suits to which it had never consented.[10] The enormity of the consequences is obvious if every invasion of any right—by definition unauthorized—is assimilated to a taking for which the government owes compensation.

[10] There is, of course, no necessary contradiction between the proposition stated and the rule that sovereign immunity does not bar suits with respect to official action which is unauthorized or taken pursuant to unconstitutional authority. See *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 702; *Malone* v. *Bowdoin*, 369 U.S. 643, 647. Both rules are founded on the premise that the sovereign itself is incapable of unauthorized or unconstitutional action, and the question in each instance is whether, tested on this premise, the act complained of is properly attributed to the sovereign. In the first case, consent having been given, the consequence of an affirmative answer is that the suit will lie against the sovereign; in the second, the same answer will bar the suit against the official on the ground that he stands in the shoes of the sovereign, which has not waived its immunity.

See *Schillinger* v. *United States, supra,* at 168.[11] That result is plainly inconsistent with the enactment, and the limitations, of the Tort Claims Act. It degrades the spontaneous decision of a generous Congress by labelling it a grudging and inadequate response to constitutional compulsion. There is no warrant for such an extravagant rewriting of the Fifth Amendment guarantee of just compensation for private property taken for public use.

We conclude that petitioner has stated no cause of action "founded on the Constitution" within the jurisdiction of the Court of Claims.

C. THERE IS NO OTHER BASIS FOR SUCH A RIGHT TO DAMAGES

In light of the pleadings, it seems unnecessary to explore the matter further. The petition filed in the

[11] Mr. Justice Brewer, speaking for the Court, put the argument forcibly:

"It is said that the Constitution forbids the taking of private property for public uses without just compensation; that therefore every appropriation of private property by any official to the uses of the government, no matter however wrongfully made, creates a claim founded upon the Constitution of the United States and within the letter of the grant in the act of 1887 of the jurisdiction to the Court of Claims. If that argument be good, it is equally good applied to every other provision of the Constitution as well as to every law of Congress. This prohibition of the taking of private property for public use without compensation is no more sacred than that other constitutional provision that no person shall be deprived of life, liberty, or property without due process of law. Can it be that Congress intended that every wrongful arrest and detention of an individual, or seizure of his property by an officer of the government, should expose it to an action for damages in the Court of Claims? If any such breadth of jurisdiction was contemplated, language which had already been given a restrictive meaning would have been carefully avoided."

Court of Claims expressly invokes only "Sections 1491(1) and (3), Title 28, United States Code" (R. 1). As a reference to the Annotated Edition of the Code makes clear, the claim thereby stated is one "[f]ounded upon the Constitution" (28 U.S.C.A. 1491(1)) or "[f]ounded upon any regulation of an executive department" (28 U.S.C.A. 1491(3)). Petitioner has never sought to enlarge his complaint. In his request for review of the Commissioner's order in the court below (R. 10–11), in his petition for certiorari (pp. 20–21), and in his brief to this Court (pp. 30, 38), he has steadfastly adhered to the constitutional and regulatory bases for his claim, without suggesting any additional ground for relief. Accordingly, having found the one claim wholly without merit and the other prematurely asserted, there is perhaps no occasion to pursue other shadowy paths. But, in any event, no alternative avenue of recovery exists.

Quite plainly, there is no "Act of Congress" upon which to found a claim. Nor can petitioner invoke an "express or implied contract with the United States" within the meaning of the Tucker Act. 28 U.S.C. 1491. Unlike a government employee, the present suitor has no colorable claim to a contract relationship with the United States, tacit or express. See *United States* v. *Driscoll*, 96 U.S. 421. And, of course, it is well settled that a contract "implied in law," or "quasi-contract," is no basis for recovery under the Tucker Act. *Russell* v. *United States*, 182 U.S. 516; *United States* v. *Holland-America Lijn*, 254 U.S. 148, *United States* v. *Minnesota Mut. Inv. Co.*, 271 U.S. 212; *State of Alabama* v. *United States*, 282

U.S. 502. See, also, *Dupree* v. *United States*, 141 F. Supp. 773, 136 Ct. Cls. 57. Finally, there is no basis for a claim under the last clause of the Tucker Act which allows recovery of "liquidated or unliquidated damages in cases not sounding in tort." The obvious reason is that the conduct alleged, if it gives rise to any cause of action, amounts to a tortious interference with contract rights. See Prosser, *Torts*, § 106, pp. 722–725. And, of course petitioner cannot avoid the exclusion of tort claims by "waiving the tort" and proceeding on a different theory. *Hill* v. *United States*, 149 U.S. 593, 598; *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381.

Needless to say, the tort claim itself was not within the jurisdiction of the court below. See 28 U.S.C. 1346(b). But it could fare no better in the district court, for the Tort Claims Act expressly bars "[a]ny claim based upon an act * * * of an employee of the Government, exercising due care, in the execution of a * * * regulation, whether or not such regulation be valid," 28 U.S.C. 2680(a), and "[a]ny claim arising out of * * * interference with contract rights," 28 U.S.C. 2680(h). See *Dupree* v. *United States*, 247 F. 2d 819, 821 (C. A. 3), affirming, 146 F. Supp. 148 (E.D. Pa.); *id.*, 264 F. 2d 140 (C.A. 3), certiorari denied, 361 U.S. 921.

The short of it is that petitioner has no apparent foundation for the recovery of damages outside the regulations of the Department of Defense. In the circumstances, he is surely not prejudiced by a ruling which requires him to exhaust the available adminis-

trative remedy before his dubious claim on other grounds is considered by the Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the order below should be affirmed and that the cause should be remanded to the Court of Claims, there to be held to abide the outcome of appropriate administrative proceedings.

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OCTOBER 1963.

APPENDIX

1. Amendment V to the Constitution of the United States, in pertinent part, provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *.

2. The Tucker Act, 28 U.S.C. 1491, in pertinent part, provides:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

3. Pertinent regulations of the Department of Defense provide as follows:

A. Pertinent portions of Department of Defense Directive 5220.6, dated February 2, 1955, Industrial Personnel Security Review Regulation, 20 Fed. Reg. 1553, provide:

> § 67.1–1 *Purpose.* This part prescribes the uniform standard and criteria for determining the eligibility of contractors, contractor employees, and certain other individuals as set forth in this part, to have access to classified defense information. It also establishes the administrative procedures governing the disposition of all cases in which a military department, or activity thereof, has made a recommendation or determination (a) with respect to the denial, suspension or revocation of a clearance of a contractor or contractor employee, and (b) with respect to the denial or withdrawal of authorization for access by certain other individuals.
>
> * * * * *
>
> § 67.1–3 *Policy.* (a) While the Department of Defense will assume, unless information to the contrary is received, that all contractors and contractor employees are loyal to the Government of the United States, the responsibilities of the military establishment necessitate vigorous application of policies designed to minimize the security risk incident to the use of classified information by such contractors and contractor employees. Therefore, adequate measures will be taken to provide continuing assurance that no contractor or contractor employee will be granted a clearance if available information indicates that the granting of such clearance may not be clearly consistent with the interests of the national security. At

the same time, every possible safeguard within the limitations of national security will be provided to ensure that no contractor or contractor employee will be denied a clearance without an opportunity for a fair hearing.

(b) The denial or revocation of a clearance in and of itself does not necessarily carry any implication that the individual is disloyal to the United States. Denial or revocation results from a determination that the granting of a clearance is not clearly consistent with the interests of the national security. Such a determination would, of course, be made in the case of a disloyal individual. However, there are many other reasons, unrelated to loyalty, which may result in such a determination and thus require the denial or revocation of a clearance. Since a clearance relates only to access to classified defense information, the denial or revocation of a clearance to a contractor or contractor employee does not preclude his participation in unclassified work.

§ 67.1–4 *Release of information.* All personnel in the Program will comply with applicable directives pertaining to the safeguarding of classified information and the handling of investigative reports. No classified information, nor any information which might compromise investigative sources or methods or the identity of confidential informants, will be disclosed to any contractor or contractor employee, or to his lawyer or representatives, or to any other person not authorized to have access to such information. In addition, in a case involving a contractor employee the contractor concerned will be advised only of the final determination in the case to grant, deny, or revoke clearance, and of any decision to suspend a clearance granted previously pending final determination in the case. The contractor will not be given a copy of the Statement of Reasons issued to the contractor employee except

at the written request of the contractor employee concerned.

* * * * * *

§ 67.5–4 *Monetary restitution.* In cases where a final determination is favorable to a contractor employee, the department whose activity originally forwarded the case to the Director will reimburse the contractor employee in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance. Such amount shall not exceed the difference between the amount the contractor employee would have earned at the rate he was receiving on the date of suspension and the amount of his interim net earnings. No contractor employee shall be compensated for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under this part.

B. Pertinent portions of Department of Defense Directive 5220.6 dated July 28, 1960, Industrial Personnel Access Authorization Review Regulation, 25 Fed. Reg. 7523, provide:

§ 67.1–1 *Authority.*

Part 67 is issued pursuant to the authority vested by law, including Executive Order 10865 (reproduced as Appendix A), in the Secretary of Defense. * * *

* * * * * *

§ 67.1–4 *Policy.*

(a) The responsibilities of the Department of Defense, including those imposed by the President in Executive Order 10865, necessitate application of policies designed to minimize the possibility of compromise incident to placing classified information in the hands of industry. Adequate measures will be taken to insure that no person is granted, or is allowed to retain, an authorization for access to classified information unless the available informa-

tion justifies a finding that such access authorization, at the specific classification category granted, is clearly consistent with the national interest.

(b) A determination that granting or retaining authorization for access to information of a specific classification category is not clearly consistent with the national interest shall result in denying or revoking authorization for such access. Any determination under this Part 67 adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned. A determination under this Part 67 favorable to an applicant is not, in and of itself, an access authorization; nor is it in any sense a determination that the applicant concerned actually requires access to classified information. Since an access authorization relates only to access to classified information, denying or revoking such an authorization does not preclude participation in unclassified work.

(c) In the absence of the power to subpoena witnesses, the Secretary of Defense, through the Director, Office of Industrial Personnel Access Authorization Review, may issue in appropriate cases invitations and requests to appear and testify, and may defray reasonable and necessary expenses incurred by such witnesses, in order that the applicant may have the opportunity for cross-examination provided by this Part 67. So far as the national security permits, investigative agencies under the control of the Department of Defense shall cooperate by identifying to the Office of Industrial Personnel Access Authorization Review, persons who have made statements adverse to the applicant and by assisting in making such persons available for cross-examiantion.

(d) All personnel involved in the processing of cases under the Industrial Personnel Access Authorization Review Program shall com-

ply with the applicable directives pertaining to the safeguarding of classified information and the handling of investigative reports. No classified information, nor any information which might compromise investigative sources or methods or the identity of confidential informants, shall be disclosed to any applicant, or to his counsel or representatives, or to any other person not authorized to have access to such information. In cases involving individual applicants, the employer concerned may be advised only of the final determination in the case and of any interim decision to suspend an access authorization previously granted. Except at the written request of the applicant, the Department of Defense shall not release copies of the Statement of Reasons or findings relative thereto outside of the Executive Branch of the Government.

* * * * *

§ 67.4 *Processing of cases.*

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§ 67.4–5 *Procedures for personal appearance proceedings.*

* * * * *

(b) *Introduction of information.* (1) The record shall consist exclusively of all information presented by the Department of Defense in accordance with this Part 67, together with all information submitted by the applicant. The record shall not be limited to evidence admissible in the courts of the United States. Any oral or documentary evidence may be received if otherwise admissible under this Part 67 and accorded the weight deemed appropriate, but irrelevant, immaterial, or unduly repetitious material may be excluded, in the sound discretion of the Chairman of the field board. Efforts shall be made to obtain the best evidence available.

(2) Unless permitted by subparagraphs (5) and (6) of this paragraph, the record may

contain no information adverse to the applicant on any controverted issue unless (i) the information or its substance has been made available to the applicant and he offers no objection to its presentation; or (ii) the information or its substance is made available to him and the applicant is afforded an opportunity to cross-examine the person providing the information either orally or by written interrogatories. The foregoing shall not apply to information bearing upon the characterization in the Statement of Reasons of any organization or individual other than the applicant. Information the admission of which is not prohibited by this subparagraph (2), or by any other provision of this Part 67, may be received and made part of the record and may be considered by any board or official charged with making determinations under this Part 67.

* * * * *

(5) Records compiled in the regular course of business, or other physical evidence other than investigative reports as such, relating to a controverted issue, which, because they are classified, may not be inspected by the applicant, may be received and considered provided that (i) the Secretary of Defense or when appropriate, the Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration, or the Director, Office of Industrial Personnel Access Authorization Review, who has been designated as their special designee for that purpose pursuant to section 5b, Executive Order 10865, has made a preliminary determination that said physical evidence appears to be material, and that failure to receive and consider it would, in view of the level of access sought, be substantially harmful to the national security, and (ii) to the extent that the national security permits, a summary or description of said physical evidence shall be made available to the applicant. In every

such case, information as to the authenticity and accuracy of such physical evidence furnished by the investigative agency involved shall be considered.

(6) A written or oral statement by a person adverse to the applicant on a controverted issue, and not relating to the characterization in the Statement of Reasons of any organization or individual other than the applicant, may be received and considered without affording an opportunity to cross-examine the person making the statement only in circumstances described in either of the following subdivisions (i) and (ii), provided however that a summary of the statement as comprehensive and detailed as the national security permits shall be made available to the applicant:

(i) The head of the department supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his identity would be substantially harmful to the national interest.

(ii) The Secretary of Defense or when appropriate, the Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration, or the Director, Office of Industrial Personnel Access Authorization Review, who has been designated as their special designee for that particular purpose pursuant to paragraph 4a(2) of Executive Order 10865, has preliminarily determined, after considering information furnished by the investigative agency involved as to the reliability of the person and the accuracy of the statement concerned, that the statement concerned appears to be reliable and material, and has determined that failure to receive and consider such statement would, in view of the level of access sought, be substantially harmful to the national security and that the person who furnished the information cannot appear

to testify (*a*) due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant, or (*b*) due to some other cause determined by the Secretary or the Deputy Secretary of Defense, or when appropriate, by the Administrator or Deputy Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration to be good and sufficient.

* * * * *

§ 67.5–2 *Reconsideration of prior decisions.*

(a) Decisions rendered under any industrial personnel review program prior to the effective date of this Part 67 which denied or revoked an access authorization may be reconsidered by such boards as the Director deems appropriate at the request of the applicant, addressed through the Director, after a finding by the appropriate board that there is newly discovered evidence or that other good cause has been shown. Whenever a final determination of denial or revocation based upon a personal appearance proceeding is found to have been unauthorized at the time it was made, authority is hereby delegated to the Director, Office of Industrial Personnel Access Authorization Review, to vacate such final determination and all subsequent administrative action predicated thereon and to take such other steps as may be deemed necessary to complete reconsideration of the case.

* * * * *

§ 67.5–3 *Monetary restitution.*

If an applicant suffers a loss of earnings resulting directly from a suspension, revocation, or denial of his access authorization, and at a later time a final administrative determination is made that the granting to him of an access authorization at least equivalent to that which was suspended, revoked or denied, would

be clearly consistent with the national interest and it is determined by the board making a final favorable determination that the administrative determination which resulted in the loss of earnings was unjustified, reimbursement of such loss of earnings may be allowed in an amount which shall not exceed the difference between the amount the applicant would have earned at the rate he was receiving on the date of suspension, revocation, or denial of his access authorization and the amount of his interim net earnings. The filing and processing of any such claim shall be in accordance with such regulations as the Secretary of Defense may prescribe after consultation with the Administrators. As used herein, earnings shall not include profits. Payment shall be limited to claims administratively determined to be just and equitable. No applicant shall be compensated for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under any industrial personnel review program. Payments under this provision shall be in full satisfaction of any and all claims, of whatever nature they may be, which the applicant has or may assert against the United States, or the Department of Defense or any of its agencies or activities, or the Federal Aviation Agency, or the National Aeronautics and Space Administration, or any of them, by reason of or arising out of the suspension, revocation or denial of access authorization.

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MISCELLANEOUS:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 84

WILLIAM L. GREENE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Claims

PETITIONER'S REPLY BRIEF

The Brief for the United States is but another step in the prolonged effort to deprive petitioner of restitution for his acknowledged economic losses. By invoking the irrelevant doctrine of exhaustion of administrative remedies and by reinterpreting and reamending administrative regulations, the United States seeks to avoid the dictates of common justice and the plain impact of this Court's decision in *Greene* v. *McElroy*, 360 U.S. 474.

1. The Central Issue in This Case is the Proper Interpretation and Application of Paragraph 26 of the 1955 Directive. An Issue Entirely Unrelated to the Doctrine of Exhaustion of Administrative Remedies

The basic premise of the Government's position on the exhaustion principle rests on a dubious and challenged reading of Paragraph 26. To the authors of the Government's Brief (pp. 11, 12) it is very plain and obvious that Paragraph 26 conditions monetary restitution upon a further administrative determination as to petitioner's present eligibility for an unwanted access authorization. But it is precisely at the interpretation, at that reading of Paragraph 26, where petitioner parts company with the Government. Petitioner submits that the wording, the context and the purpose of Paragraph 26 belie the Government's interpretation and that the thrust of the *Greene* v. *McElroy* decision is such as to entitle petitioner to immediate restitution without further administrative proceedings.[1]

The focal point of this case is thus the proper interpretation and application of Paragraph 26. If petitioner's view is correct, the right to restitution has already accrued quite apart from any additional access authorization procedure that is available or that is offered. Indeed, the necessary consequence of the Government's position would confirm the accrual of that right once Paragraph 26 is read as petitioner suggests. The whole of the exhaustion argument rests upon nothing more substantial than a questionable interpre-

[1] To the extent that restitution under Paragraph 26 is the equivalent of any claim for money pursuant to the Fifth Amendment, the Fifth Amendment problems disappear and the Court need not enter the constitutional thicket suggested by the Government's Brief (pp. 18-29).

tation of Paragraph 26; if that interpretation is wrong, the exhaustion point totally disappears. And even if the Government's interpretation be accepted, the resulting denial of relief to petitioner is explainable in terms of a failure to state a cause of action rather than in terms of a failure to exhaust administrative procedures relative to monetary relief.[2] If in truth Paragraph 26 validly conditions the liability of the United States upon an administrative ruling as to current access eligibility, petitioner's suit in the Court of Claims falls for lack of a claim against the United States founded upon "any regulation of an executive department" within the jurisdictional bounds of 28 U.S.C. § 1491.

Moreover, if Paragraph 26 is to be read as petitioner contends it must be read, the action of the Court of Claims in suspending proceedings pending pursuit of further administrative remedies raises serious jurisdictional problems. The Court of Claims has been invested by Congress with jurisdiction to entertain and resolve claims against the United States founded upon executive department regulations. 28 U.S.C. § 1491. To withhold jurisdiction pending exhaustion of further administrative proceedings not required in accordance with some statutory scheme is to engraft a disability upon § 1491 which Congress has not authorized. Cf. *Soriano* v. *United States*, 352 U.S. 270, 274-

[2] The only true "exhaustion" principle at this juncture is the exhaustion of petitioner's monetary claim in the Department of Defense prior to institution of suit in the Court of Claims. Petitioner undeniably exhausted the possibilities in that respect. After considering the claim for nearly a year and a half, the Department of Defense determined "that Mr. Greene does not qualify for monetary restitution under the provisions of Paragraph 26." R. 5-6.

275; *Clyde* v. *United States*, 13 Wall. 38. This the Court of Claims may not do.

Hence the critical nature of the interpretative problem becomes clear. It is that problem rather than the exhaustion concept, that contains the key to this case. If petitioner has satisfied the requirements of Paragraph 26, nothing in the Government's Brief contests petitioner's right to monetary restitution pursuant to that Paragraph.

2. Petitioner Has Satisfied the Plain Requirements of Paragraph 26, Thereby Entitling Him to Immediate Monetary Restitution

Paragraph 26 of the 1955 Directive says quite simply that monetary restitution is allowable for loss of earnings "where a final determination is favorable to a contractor employee." The circumstances of this case clearly demonstrate that such a final and favorable determination has been rendered as to this petitioner.

The decision and judgment entered by this Court in *Greene* v. *McElroy* in 1959 had two necessary consequences in terms of satisfying the requirements of Paragraph 26:

(1) The decision in and of itself represents a conclusive and favorable determination with respect to this petitioner. While this Court carefully refrained from entering into or deciding the merits of petitioner's security status, it nonetheless rendered a final ruling—favorable to petitioner—relative to the absence of any authorization for depriving petitioner of his job. That ruling voided the only impediment that existed during the years in question to the continuation of petitioner's employment by ERCO; it held that there was no authority for depriving him of that em-

ployment in a proceeding lacking the elements of cross-examination and confrontation. But for the unauthorized action of the Government, petitioner would have continued his work at ERCO and would have proceeded in his career as an aeronautical engineer.

Such a final determination as to the absence of authority so to deprive petitioner of his employment opportunities is as final, as meaningful and as favorable —insofar as the past period is concerned—as would be a final determination grounded on eligibility for access authorization. Certainly adjudications as to basic authority are as consequential and as final as those concerning substantive merits.

The possibility that the Government might have used other techniques to deprive petitioner of his job during the years in question is irrelevant. Cf. *Vitarelli* v. *Seaton*, 359 U.S. 535, 545. Equally immaterial is the subsequent attempt in 1960 to provide the Presidential authorization which was found lacking as to prior years. The critical fact is that this Court has conclusively determined that at least prior to July of 1960 there was no authority to deprive petitioner of his job. In that simple fact lies the "final determination . . . favorable to a contractor employee," to wit, this petitioner, within the meaning of Paragraph 26.

(2) Alternatively, yet consistent with the foregoing factor, the decision in *Greene* v. *McElroy* reinstated a prior final administrative determination favorable to petitioner on the merits of his access eligibility for the years in question. On remand from this Court and with the consent of the Government, the District Court entered an order which voided and expunged all adverse security determinations and rulings. Such expungement included all "final" adverse determinations but

left unaffected any "final" favorable determinations as to petitioner's security status.

Thus the last and the only determination now appearing in petitioner's lengthy security file is the "final" action of the IERB on January 29, 1952, authorizing petitioner to work on Secret contract matters for ERCO. 360 U.S. at 480. This "final" determination, it must be noted, was premised upon the identical charges and the identical considerations that were involved in the later adverse determinations. See 360 U.S. at 484-486. Those subsequent determinations, all of which have been expunged, were in essence merely reconsiderations of the IERB decision of 1952. And by virtue of the expungement order, the finality and the effectiveness of this 1952 administrative decision have been reinstated—at least for the period between petitioner's discharge on April 23, 1953, and the expungement order of December 14, 1959.

Petitioner's case is accordingly one, in the language of Paragraph 26, where "a final determination is favorable to a contractor employee" for the period involved, entitling him to reimbursement "in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance." The suspension of employment rights in this instance has been found by the Court to be totally unauthorized and void. And by judicial action the only final administrative action that can be recognized during the interim period is the reinstated "final" and "favorable" IERB ruling of 1952.

3. The Government's Interpretation of Paragraph 26 Is Contrary to Its Plain Meaning, Its Obvious Purpose, and the Necessary Impact of the Greene v. McElroy Decision

The United States concedes (Brief, pp. 9, 14, 15) that petitioner's monetary restitution claim was filed under, and must ultimately be judged by, the provisions of Paragraph 26 of the 1955 Directive. But in so doing, the Government has confused and entwined the provisions of Paragraph 26 of the 1955 Directive with those of Paragraph V.C. of the 1960 Directive. The result is a hopeless admixture of two different regulations. And it is a result rendered even more intolerable by the *ad hoc* amendments and exceptions read into the regulations in the Government's Brief.

(1) While acknowledging that the prime condition to be satisfied under Paragraph 26 is the obtaining of "a final determination . . . favorable to the contractor employee" (Brief, p. 11), the United States argues that such a determination relates only to an *administrative restoration* of eligibility for access to classified information (Brief, p. 11). To sustain that argument, however, the Government points not to the 1955 Directive or to Paragraph 26 thereof but to the 1960 Directive. "As the current provision makes clear," says the Brief (p. 13), "that determination is properly one to be made at the administrative level." Thus by an artful blending of the two Directives, the Government seeks to read the word "administrative" into Paragraph 26.

That such an effort is impermissible is dictated by the plain language of Paragraph 26. The reference therein to a "final determination" which is "favorable to the contractor employee" admits to no distinction between an administrative and a judicial deter-

mination of a final nature.[3] The Department of Defense, in framing the subsequent 1960 Directive, conceded as much by casting the analogous provision of Paragraph V.C. in terms of "a final administrative determination."[4] The absence of the word "administrative" in Paragraph 26 can mean only one thing—that a final and favorable determination by any person, board or tribunal with authority to render such a ruling entitles the employee to recover montary restitution. And the most obvious instance of a non-administrative determination is that rendered by a judicial tribunal, making a final determination that voids adverse and unauthorized administrative rulings and reinstating an earlier final administrative grant of

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[3] The language of Paragraph 26 in this respect is identical with that appearing in the immediately preceding industrial security regulations, Paragraph 23 of the Industrial Personnel and Facility Security Clearance Program, May 4, 1953. That provision authorized reimbursement "In cases where a final determination is favorable to a contractor employee."

But in an earlier regulation, Paragraph 4(d) of the Procedures Governing Appeals to the Industrial Employment Review Board, November 7, 1949, as revised November 10, 1950, it was provided that "When the Board sets aside a decision involving an individual," the Board may recommend reimbursement.

Cf. Act of August 26, 1950, 64 Stat. 476, as amended by the Act of July 29, 1958, 72 Stat. 432, 5 U.S.C. 22-1, dealing with monetary restitution for Government employees who are reinstated following suspension or dismissal for security reasons. That provision authbrizes monetary restitution when the agency head, in his discretion, reinstates or restores the employee to duty.

[4] As a general principle of construction, applicable to statutes and administrative regulations alike (*Miller* v. *United States*, 294 U.S. 435, 439), it will be presumed that the purpose of an amendment or addition is to make a change in existing law. See *Mogis* v. *Lyman-Richey Sand & Gravel Corp.*, 189 F. 2d 130, 141 (C.A. 8); and see *United States* v. *Bashaw*, 152 U.S. 436.

clearance. That was precisely the type of "final determination" rendered by the District Court in this case, acting pursuant to this Court's judgment in *Greene* v. *McElroy*.

(2) The Government's proposed reading of Paragraph 26 is also said (Brief, pp. 11-12) to be "compelled by the context" in which it appears in the 1955 Directive, a regulation providing for administrative review of preliminary denials or revocations of clearance and culminating in ultimate reconsideration or reversal by the Secretary of Defense.

The immediate "context" of Paragraph 26, of course, relates to an acknowledgement by the Department of Defense that equity and justice require that those employees who have been unfairly deprived of their jobs by the actions of Governmental security officers should be compensated for their losses. See Petitioner's Main Brief, p. 28. Paragraph 26, in other words, concerns the conditions surrounding the obligation of the Government to pay for past or accrued economic losses suffered by contractor employees. It does not purport to authorize or contemplate further administrative proceedings in addition to any "final determination" that has already been rendered.

Nor does the general "context" of Paragraph 26 support the Government's reading. Every statute or regulation establishing an administrative process has a self-contained administrative finality. Such finality was obtained in the instant case when, following a series of "final" security clearances, the Secretary of the Navy summarily determined in 1953 that petitioner's continued access to classified Navy information was inconsistent with the best interest of national

security, a determination reaffirmed on reconsideration by the EIPSB in 1954 and by the Director of the Office of Industrial Personnel Security in 1956.

But superimposed on most administrative procedures after the rendition of a final administrative ruling is the process of judicial review. When that judicial review occurs and results in a judicial determination as to either the substantive or procedural validity of the administrative action, a new and binding "final determination" has been rendered; whatever may be the language of the administrative regulation in question. And it has been "the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action." *Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U.S. 103, 113-114.

Thus the context of Paragraph 26 and the 1955 Directive must of legal necessity encompass final judicial determinations favorable to the contractor employee—including determinations relative to procedural or jurisdictional defects. When this Court determined that the Department of Defense officials lacked authority to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination, there was a "final determination" favorable to the petitioner both within the literal words and the context of Paragraph 26. The fact that the Court found it unnecessary to deal with the merits of petitioner's security status did not make the ruling as to the Government's lack of power or authority any less final or any less favorable.

See *Harmon* v. *Brucker*, 355 U.S. 579.[5] And when the expungement order of the District Court is added to the opinion of this Court, the result is a final and conclusive determination eradicating all adverse administrative rulings and reinstating an earlier final and favorable ruling of an administrative nature. A more final or favorable determination would be difficult to imagine.

(3) The Government tries to convert the requirement of Paragraph 26 that there be "a final determination . . . favorable to a contractor employee" into a showing "that he was entitled to clearance during the period for which he claims damages by reason of the denial of clearance." Brief, p. 13. Here again the Government seeks refuge for such an attempt in the language of the 1960 Directive, stating (Brief, p. 13) that this "is what the 1960 provision expressly requires." It is then blandly stated that "whether his claim is judged under the old or the new regulation, under the circumstances of petitioner's case, the test is the same." Brief, p. 13.

The gross unfairness of this not-so-subtle shift from the 1955 Directive to the 1960 Directive is at once obvious. Whereas Paragraph 26 of the 1955 regulation speaks simply of "a final determination . . . favorable to a contractor employee," Paragraph V.C. of the

[5] An administrative determination by the Secretary of Defense as to the lack of authority to revoke a prior security clearance could hardly be said to be wanting in finality or favorableness. And a judicial determination to that effect is at least as final and favorable, if not more so. See *Burrell* v. *Martin*, 232 F. 2d 33, 38-39 (App. D.C.), and *Almour* v. *Pace*, 193 F. 2d 699, 701, fn. 6 (App. D.C.), for the practical effect a judicial adjudication may have on a Government employee's right to collect back pay for the period of an illegal discharge.

1960 regulation refers to "a final administrative determination . . . that the granting to him of an access authorization at least equivalent to that which was suspended, revoked or denied, would be clearly consistent with the national interest." Thus the 1960 provision requires not only an administrative determination but defines the nature of that determination in terms of present access authorization. No similar requirements are to be found in the 1955 Directive. Serious questions as the validity of retroactively applying a 1960 standard to a claim filed under a 1955 regulation would be raised if the Government's reading were accepted. See *Miller* v. *United States*, 294 U.S. 435, 439; *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202. As this Court said in *Union Pacific R. Co.* v. *Laramie Stock Yards Co.*, 231 U.S. 190, 199, "the first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retroactive operation will not be given to a statute which interferes with antecedent rights, or by which human action is regulated, unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'"

But it may be questioned whether, even if the 1960 standard be applied to petitioner's claim, there is any need to show that he was entitled to clearance during the period for which he claims damages. Not even Paragraph V.C. of the 1960 Directive makes that requirement. And the Government's Brief (p. 13), after flatly stating such to be the requirement, quickly withdraws to a restatement of the standard—"the required determination is simply that an authorization 'would be' granted upon demand and a showing of need."

In other words, the 1960 Directive requires that there be a determination not of past access eligibility but of present and future eligibility. Any intention in the 1960 Directive to review past eligibility is contained in the provision of Paragraph V.C. requiring that the board making the new access eligibility determination also decide "that the administrative determination which resulted in the loss of earnings was unjustified." But the Government has conveniently excised that provision in its Brief (p. 14), the Department of Defense having advised the Department of Justice "that no such showing will be required here, in light of the fact that petitioner's claim was initially filed under the 1955 regulation, at a time when the actual practice was not to undertake a separate review of the correctness of the initial decision."

Thus the Government comes full swing back to the stark simplicity of the language of Paragraph 26 of the 1955 Directive, conceding that it does not encompass a further review of the adverse initial determinations. All that is really left of the hop-scotch effort to infuse Paragraph 26 with some of the conditions set forth in the 1960 Directive is the unwarranted assertion that Paragraph 26 somehow incorporates the 1960 requirement that there be a new administrative determination that the grant of an access authorization equivalent to that which was revoked would be clearly consistent with the national interest. In short, the contention is that, to obtain restitution under Paragraph 26, there must be a determination as to the individual's *present* access eligibility.

The complete answer, of course, is that Paragraph 26 makes no such requirement. And there is no compelling reason advanced why such a requirement should

be read into that provision by implication. Certainly there is no necessary relationship, absent express language in Paragraph 26, between petitioner's present access eligibility and his entitlement to restitution for a past period of time. Even if he were to be considered presently ineligible for access authorization, there is still "a final determination" favorable to him for the period for which he claims damages. The Government, moreover, asserts no overriding public interest which compels restitution to be conditioned on present access eligibility. Indeed, the public interest expressed in Paragraph 26 of providing reimbursement for those who were unfairly and improperly deprived of their jobs would seem to preclude such an unexpressed condition.

The incongruity of requiring a present access eligibility determination in the circumstances of this case is emphasized by the complete lack of any need for such a determination on petitioner's part. He is not presently employed in a defense industry and has no need or desire to secure any determination as to his access eligibility. Thus he is not eligible to seek a security clearance or an access eligibility determination at this time.[6] And any effort to impose the re-

[6] The present Department of Defense Industrial Security Manual for Safeguarding Classified Information (Revised, Dec. 31, 1962), p. 31, Par. 19, Sec. III, provides that "A personnel security clearance action for a person shall not be initiated prior to the employment of the individual by a [defense] contractor." See also the substantially identical provision in the earlier 1960 edition of the Manual, 1 CCH Govt. Contracts Rept. ¶8667, par. 19, Sec. III, p. 13,182.

Thus, contrary to the Government's assertion (Brief, pp. 13-14), a finding of present eligibility for security clearance is inappropriate when the claimant neither needs such clearance nor is employed by a defense contractor at the present time. The technical difference between such a finding and an access authorization does not negate the conditions precedent to that finding.

quirement of such a finding on this petitioner falls into the category of insisting upon an advisory opinion unrelated to need, eligibility or the equities involved in the deprivation of petitioner's job rights. That is indeed a poor reason for reading such an irrelevant condition into the plain wording of Paragraph 26.

(4) Finally, the Government seeks to analogize this case to a criminal proceeding where the Court "in effect vacated the judgment, leaving the charge and the resulting suspension in effect,[7] and remanded the matter for a 'new trial' by correct proceedings, should petitioner wish to pursue the case." Brief, p. 12. Admittedly, this analogy "is not altogether satisfactory." *Ibid.* But in fact the analogy is totally inapposite.

When this Court declared that the Department of Defense officials lacked authority to deprive petitioner of his job, it did more than declare that some procedural defect had marred the proceeding and therefore warranted a new trial. In effect this Court held that the Department of Defense lacked jurisdiction to do what it did to this petitioner. And the monetary injuries which petitioner suffered were the direct result

[7] As a result of this Court's opinion and the ensuing expungement order of the District Court, there is no charge or resulting suspension left in effect. The original charges against petitioner resulted in favorable determinations as to his security clearance, determinations which remain on the record. The critical adverse determination was that summarily made on April 17, 1953, by the Secretary of the Navy, which resulted in the loss of petitioner's job at ERCO. That determination has now been expunged. There was a subsequent letter, dated April 9, 1954, from the EIPSB reiterating the original charges and contemplating a further but limited hearing conducted without confrontation or cross-examination of witnesses. See R. 9, No. 180, Oct. Term, 1958. That letter did not suspend any clearance which petitioner then had and obviously is without significance now.

of that unwarranted action of the United States, proceeding without authority or jurisdiction.

Under these circumstances, this Court's judgment cannot be construed, by implication or otherwise, as a direction or authorization for a new security hearing that might result in revoking his employment rights again as of April 23, 1953. Cf. *Stickney* v. *Wilt*, 23 Wall. 150. This Court, as well as the District Court in entering its expungement order, made a final determination as to the voidness of the 1953-1956 proceedings causing petitioner's loss of employment. "Whatever was before the Court, and is disposed of, is considered finally settled." *Sibbald* v. *United States*, 12 Pet. 488, 492; *N.A.A.C.P.* v. *Alabama*, 360 U.S. 240, 244-245. The Government cannot now undo what the Court has decided and invest itself with authority to legitmiatize the 1953-1956 action in causing petitioner's loss of employment. Particularly is that undoing improper where such action has been found to have infringed upon constitutionally-protected rights and to have caused irreparable injury and damage.

The force of all these various considerations arising out of the Government's analysis is such as to compel a reading of Paragraph 26 favorable to petitioner's right to recover compensation for past losses. Nothing in the language or context of Paragraph 26 prohibits such recovery. Indeed, that language and that context permit a full recognition of the equity and justice underlying petitioner's claim, as well as a recognition of the legal conseqeunces of the decision in *Greene* v. *McElroy*. The failure of the Court of Claims so to read Paragraph 26 was plainly erroneous.

4. The Principles of the Just Compensation Clause Justify An Award to the Petitioner and Underscore the Proper Interpretation of Paragraph 26

When the United States takes private property for public use, the Just Compensation Clause of the Fifth Amendment commands that just compensation must be paid therefor. It is that provision that has given rise to petitioner's alternative claim for just compensation in this case.[8]

The constitutional problems thus brought into focus relate not only to the propriety of this claim but also bear heavily upon the proper interpretation to be accorded Paragraph 26 of the 1955 Directive. In addition to the general principle that a regulation should be construed so as to avoid the constitutional problems which might otherwise be raised (see, e.g., *Peters* v. *Hobby*, 349 U.S. 331, 338; *Communist Party* v. *Control Board*, 351 U.S. 115, 122), Paragraph 26 should not be read as granting petitioner less than his constitutional due. The purpose of this back pay provision, to grant "equity and justice" to those employees "relieved [of their jobs] at the suggestion of representatives of the Federal Government,"[9] would seem plainly to reflect a desire on the part of the Government to give the injured employee the equivalent of what he

[8] Petitioner makes no assertion of a compensation claim under the Due Process Clause of the Fifth Amendment. The statements in the Government's Brief (pp. 19-22) as to such a claim are therefore irrelevant.

[9] See Hearings Before the House Committee on Appropriations on Department of Defense Appropriations for 1958, 84th Cong., 1st Sess., p. 777, quoted at page 28 of Petitioner's Main Brief. The Brief for the United States nowhere explains how the Government's position in this case can be reconciled with that of the Department of Defense during those hearings.

would otherwise be entitled to as a matter of just compensation.

The basic premise of petitioner's right to just compensation is the recognition in the *Greene* decision, 360 U.S. at 492, that the right to hold specific employment and to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts of the Fifth Amendment. That petitioner was deprived of his "property" right in holding employment at ERCO is now beyond dispute. And he was deprived of it, to his injury, by actions of the Government, actions described by this Court as "in the nature of adjudications affecting legal rights." *Hannah* v. *Larche*, 363 U.S. 420, 451. Thus petitioner's "property" has been interfered with, taken and destroyed by the Government. And the resulting damage renders the Government liable under the Just Compensation Clause.

The Brief for the United States, however, flatly denies that there is any basis for an award under the Just Compensation Clause. It questions whether the "property" interfered with comes within the "private property" concept of the Clause and whether, under the circumstances, it was "taken for public use." And the Government asserts that, in any event, the lack of authority for the Governmental action completely immunizes the United States from liability under the Just Compensation Clause.

(1) The suggestion, which is not firmly articulated in the Government's Brief (see pp. 22-23), that "property" has a different meaning in the Due Process Clause of the Fifth Amendment than it has in the Just

Compensation Clause, cannot seriously be maintained.[10] Indeed, this Court has consistently read into the Due Process Clause of the Fourteenth Amendment an obligation on the states to grant just compensation for the taking of private property, although the Fourteenth Amendment contains no parallel provision to the Just Compensation Clause of the Fifth. See, e.g., *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226.[11]

(2) Likewise inadmissible is the suggestion by the Government (Brief, p. 23) that petitioner's property right in his job is "a purely abstract right" which is not "susceptible of transfer" and hence is not "property" for which the Government owes compensation. This Court's deep concern with the right of every citizen to follow any lawful calling, business or profession he may choose free from unwarranted and unauthorized interference reflects a solicitude for something more significant than "a purely abstract right." As long ago as 1889, this Court in *Dent* v. *West Virginia*, 129 U.S. 114, 121-122, put to rest any notion that the right to employment is more abstract or less meaningful than the right to own real or personal property:

> This right [to follow any lawful calling, business or profession] may in many respects be considered

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[10] In his dissenting opinion in *General Box Co.* v. *United States*, 351 U.S. 159, 168-169, Mr. Justice Douglas, joined by Mr. Justice Harlan, noted that if the timber involved in that case was, as the Court conceded, "property" so far as the Due Process Clause is concerned, it would seem to be "property" within the meaning of the Just Compensation Clause of the same Amendment.

[11] Similarly, "property" for just compensation purposes under the Fifth Amendment is "property" for the same purposes under the Fourteenth Amendment. Compare *United States* v. *Causby*, 328 U.S. 256, with *Griggs* v. *Allegheny County*, 369 U.S. 84.

> as a distinguishing feature of our republican institutions. Here all vocations are open to everyone on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and *cannot be arbitrarily taken from them, any more than their real or personal property can thus be taken.* [Emphasis added.]

Moreover, the Government itself appears to concede (Brief, p. 23) that the "property" referred to in the Just Compensation Clause is not limited to realty or personalty. Patent rights (*James* v. *Campbell*, 104 U.S. 356) and contract rights (*Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106) are among the non-physical things that have long been recognized as included within this constitutional concept of "property."[12] But the outer limits of the "property" covered by this Clause are not definable by the truism (Brief, p. 23) that not all rights or economic interests are included. What is critical is that legal protection be

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[12] The other decisions relied upon in the Government's Brief, p. 23, all deal with the measure of compensation rather than the question whether compensation is due. These cases show that in computing the amount due an owner of property taken by the United States the general market value rather than the owner's personal attachment must be the basis of valuation. But these cases do not support the proposition, for which the Government apparently cites them, that property whose market value cannot be determined can be appropriated by the United States without any payment whatever. In the instant case, there has never been any question but that the value of the property taken from the petitioner is the equivalent of his loss of earnings caused by the Government's action. If petitioner were claiming an award to cover his personal enjoyment and satisfaction in being an aeronautical engineer or his personal attachment to ERCO, the cases cited by the Government would be in point.

available for the interests at stake. As this Court stated in *United States* v. *Willow River Power Co.*, 324 U.S. 499, 502, "only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion." In short, "economic uses are rights only when they are legally protected interests." *Ibid.*, 503. And since this Court in the *Greene* case has already held that petitioner's right to employment is included among the "legally protected interests," it must be considered within the scope of the Just Compensation Clause.

(3) The contention of the Government (Brief, pp. 23-24) that there was here no "taking" of property in the constitutional sense since the United States did not and could not acquire petitioner's personal right to employment ignores the settled proposition that a constitutional "taking" may involve something more than acquisition and destruction. In the words of this Court's opinion in *United States* v. *General Motors Corp.*, 323 U.S. 373, 378:

> In its primary meaning, the term "taken" would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.

And since the sovereign here acted so as to destroy petitioner's interest in his continued employment, there has been a "taking" of that interest for purposes of the Just Compensation Clause. The inability of the United States to acquire or use that interest does not detract from the deprivation suffered by the petitioner.

(4) The assertion by the United States (Brief, p. 24) that the governmental invasion of petitioner's property right can be likened to a noncompensable frustration of an enterprise is plainly unsound.[13] Loss of profits and prospective business opportunities, which characterize a "frustration," are generally the indirect by-products of valid or necessary governmental action and hence are noncompensable. See *United States* v. *Grand River Dam Authority*, 363 U.S. 229, 286. But in this case the injury to petitioner's property interest was direct and undenied. Just as the "direct and immediate result" of the governmental action "was to take from claimant its contract and its rights thereunder" in *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106, 120[14]—

[13] This contention that there was merely an indirect injury to the petitioner bears a strong resemblance to the position advanced earlier by the Government in *Greene* v. *McElroy*, 360 U.S. at 492, that "the admitted interferences which have occurred are indirect by-products of necessary governmental action to protect the integrity of secret information and hence are not unreasonable and do not constitute deprivations within the meaning of the [Fifth] Amendment." The Court found it unnecesary to pass upon the validity of that contention, but it did rule that the governmental action was totally unauthorized.

[14] The Court in *Brooks-Scanlon*, 265 U.S. at 120-121, carefully distinguished *Omnia Co.* v. *United States*, 261 U.S. 502, relied upon by the Government here (Brief, p. 24), by pointing out that in *Omnia* the United States had not expropriated the contract itself but had merely made impossible the fulfillment of the contract. Thus if the Government in the instant case had cancelled its con-

thereby rendering the Government liable to pay compensation—so here the direct and immediate result of the governmental action was to take from petitioner his employment contract and his rights thereunder.

(5) Finally, the obligation of the United States to pay just compensation is not to be denied by the fact that the actions of the Defense Department officials that immediately caused the deprivation of petitioner's property rights were found to be unauthorized. The gravamen of a just compensation claim is that the sovereign—not individual officers thereof—has taken property for public use without paying compensation. Here the United States has consistently maintained that it may take petitioner's job rights for what it conceives to be public necessity in terms of limiting the dissemination of secret military information.[15] It continues to assert that right, even to the point of urging that it may now reexamine the situation in light of *Greene* v. *McElroy* and eventually, if it so desires, reaffirm past actions. In other words, quite apart from the past unauthorized actions of the Defense Department officials, the United States does not disavow its sovereign power to deprive petitioner of his security

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tract with ERCO and petitioner had lost his job as a result, *Omnia* would be in point. But the *Greene* decision makes clear that the Government directly deprived petitioner of his job. The *Brooks-Scanlon* doctrine thus controls.

[15] The basic premise of the Government's argument in the *Greene* case (Brief for the United States, p. 23, No. 180, Oct. Term, 1958) was that the "power of the executive department to control, in the internal operations of the executive branch, the dissemination of secret military information is peculiarly and primarily an *executive* power." That Brief consistently asserted that the action of removing Greene from his job was that of "the Government."

clearance and his employment rights. When, in the course of exercising such power, the United States has injured an individual just compensation should be paid. Accordingly, both the 1955 and 1960 Directives constitute express recognitions that the source of any reimbursement is the United States and not any individual officers thereof.

Indeed, the whole philosophy of the just compensation concept is that economic losses inflicted by the exercise of governmental power should fall upon the public rather than upon those individual citizens who happen to lie in the path of the exercise of that power. *Armstrong* v. *United States*, 364 U.S. 40, 49; *United States* v. *Willow River Power Co.*, 324 U.S. 499, 502. And that is the philosophy which underlies Paragraph 26 of the 1955 Directive, designed as it is to achieve "equity and justice" for those contractor employees who are injured by the action of the Government.

CONCLUSION

The foregoing considerations, supplementing those in Petitioner's Main Brief, require a reversal of the judgment of the Court of Claims and a remand to that court for the appropriate computation of the back pay due to petitioner.

Respectfully submitted,

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